STATE OF WEST VIRGINIA

Report

of the

Court of Claims

1944-1946

Volume

3

STATE OF WEST VIRGINIA

REPORT

OF THE

COURT OF CLAIMS

For the period from December 1, 1944 to November 30, 1946.

By

JOHN D. ALDERSON

Clerk

VOLUME III

(Published by authority of an order of the State Court of Claims and as required by and pursuant to section 25 of the Court of Claims law, Code 14-2-25).

WM. W. GAUNT & SONS, INC.

Reprint Edition

Wm. W. GAUNT & SONS, INC.

3011 Gulf Drive, Holmes Beach, Florida 33510

Printed in the United States of America

by

Jones Offset, Inc., Bradenton Beach, Florida 33510

TABLE OF CONTENTS

ERRATUM

Page 212, line one, first paragraph should read "After completing his bookwork at Ripley on Saturday, July"

PERSONNEL

OF THE

STATE COURT OF CLAIMS

HONORABLE MERRIMAN S. SMITH — Presiding Judge
HONORABLE ROBERT L. BLAND — Judge
HONORABLE CHARLES J. SCHUCK — Judge

HONORABLE WALTER T. CROFTON, JR. — Alternate Judge
HONORABLE JACK MARINARI — Alternate Judge
HONORABLE G. H. A. KUNST — Alternate Judge

JOHN D. ALDERSON — Court Clerk
LENORE THOMPSON — Law Clerk

IRA J. PARTLOW — Attorney General

Letter of Transmittal

To His Excellency
Honorable Clarence W. Meadows
Governor of West Virginia

Sir:

In conformity with the requirements of section twenty-five of the Court of Claims law, approved March sixth, one thousand nine hundred forty-one, and an order of the State Court of Claims entered of record on September twenty-third one thousand nine hundred forty-six, I have the honor to transmit herewith the report of the State Court of Claims for the period from December first, one thousand nine hundred forty-four to November thirtieth, one thousand nine hundred forty-six.

Respectfully submitted,

JOHN D. ALDERSON,
Clerk

TERMS OF COURT

Four regular terms of court are provided for annually—the second Monday of January, April, July and October.

STATE COURT OF CLAIMS LAW

Passed March 6, 1941; amended March 8, 1945.

CHAPTER 14, CODE.

Article 2. Claims Against the State.

Section

Section 1. *Purpose.*—The purpose of this article is to provide a simple and expeditious method for the consideration of claims against the state that because of the provisions of section thirty-five, article six of the constitution of the state, and of statutory restrictions, inhibitions or limitations, cannot be determined in a court of law or equity; and to provide for proceedings in which the state has a special interest.

Sec. 2. *Definitions.*—For the purpose of this article "Court" means the state court of claims established by section four of this article.

"Claim" means a claim authorized to be heard by the court in accordance with this article.

"Approved claim" means a claim found by the court to be one that should be paid under the provisions of this article.

"Award" means the amount recommended by the court to be paid in satisfaction of an approved claim.

"Clerk" means the clerk of the court of claims.

"State agency" means a state department, board, commission, institution, or other administrative agency of the state government: *Provided, however,* That a "state agency" shall not be considered to include county courts, county boards of education, municipalities, or any other political or local subdivision of the state regardless of any state aid that might be provided.

Sec. 3. *Proceedings Against State Officers.*—The following proceedings shall be brought and prosecuted only in the circuit court of Kanawha county:

1. Any suit in which the governor, any other state officer, or a state agency is made a party defendant, except as garnishee or suggestee.

2. Any suit attempting to enjoin or otherwise suspend or affect a judgment or decree on behalf of the state obtained in any circuit court.

This section shall apply only to such proceedings as are not prohibited by the constitutional immunity of the state from suit under section thirty-five, article six of the constitution of the state.

Sec. 4. *Court of Claims.*—There is hereby created a "State Court of Claims" which shall be a special instrumentality of the Legislature for the purpose of considering claims against

the state, which because of the provisions of section thirty-five, article six of the constitution of the state, and of statutory restrictions, inhibitons or lmitations, cannot be heard in a court of law or equity, and recommending the disposition thereof to the Legslature. The court shall not be invested with or exercise the judicial power of the state in the sense of article eight of the constitution of the state. A determination made by the court shall not be subjected to appeal to or review by a court of law or equity created by or pursuant to article eight of the constitution.

The court shall consist of three judges who shall be appointed by the governor with the advice and consent of the senate. The terms of judges shall be six years, except that the first membership of the court shall be appointed as follows: One judge for two years; one judge for four years, and one judge for six years. As these appointments expire, all appointments shall be for six-year terms. Not more than two of the judges shall be members of the same political party. An appointment to fill a vacancy shall be for the unexpired term. The court shall each year elect one of its members as presiding judge.

The governor shall appoint three persons as alternate judges. Whenever a regular judge is unable to serve or is disqualified, the governor shall designate an alternate judge to serve in the place and stead of the regular judge. Alternate judges shall be appointed for six-year terms except that the first alternates appointed shall be designated to serve for two, four, and six-year terms as in the case of regular judges. Not more than two alternate judges shall belong to the same political party. The provisions of sections eight to ten, inclusive, of this article with respect to judges shall apply with equal effect to alternates.

Sec. 5. *Court Clerk.*—The court shall have authority to appoint a clerk, and shall fix his salary at not to exceed the sum of three thousand six hundred dollars per annum to be paid out of the regular appropriation for the court. The clerk shall have custody of all records and proceedings of the court, shall attend meetings and hearings of the court, shall administer

oaths and affirmations and shall issue all official summonses, orders, statements and awards.

Sec. 6. *Terms of Court.*—The court shall hold at least four regular terms each year, on the second Monday in January, April, July and October. If, however, one week prior to the date of a regular term, no claims are ready for hearing or consideration, the clerk, with the approval of the presiding judge, shall notify the members that the court will not be convened. So far as possible, the court shall not adjourn a regular term until all claims then upon its docket and ready for hearing or other consideration have been disposed of.

Special terms or meetings may be called by the clerk at the request of the presiding judge whenever the number of claims awaiting consideration, or any other pressing matter of official business, makes such a term advisable.

Sec. 7. *Meeting Place of the Court.*—The regular meeting place of the court shall be at the state capitol, and the board of public works shall provide adequate quarters therefor. When deemed advisable, in order to facilitate the full hearing of claims arising elsewhere in the state, the court may convene at any county seat.

Sec. 8. *Compensation of Members.*—Each judge of the court shall receive twenty dollars for each day actually served, and actual expenses incurred in the performance of his duties. Requisition for traveling expenses shall be accompanied by a sworn and itemized statement, which shall be filed with the auditor and preserved as a public record. For the purposes of this section, days served shall include time spent in the hearing of claims, in the consideration of the record, and in the preparation of opinions. In no case, however, shall a judge receive compensation for more than one hundred fifty days' service in any fiscal year.

Sec. 9. *Oath of Office.*—A judge shall, before entering upon the duties of his office, take and subscribe to the oath prescribed

by article four, section five of the constitution of the state. The oath shall be filed with the clerk.

Sec. 10. *Qualifications of Judges.*—A judge shall not be a state officer or a state employee except in his capacity as a member of the court. A member shall receive no other compensation from the state.

A judge shall not hear or participate in the consideration of a claim in which he is personally interested. Whenever a member is thus disqualified, the clerk shall notify the governor, and thereupon the governor shall assign an alternate to act during such disqualification. Whenever a judge is unable to attend and serve for any reason, the governor shall, when so notified by the clerk, assign an alternate to act in the absence of the regular judge.

Sec. 11. *Attorney General to Represent State.*—The attorney general shall represent the interests of the state in all claims coming before the court.

Sec. 12. *General Powers of the Court.*—The court shall, in accordance with this article, consider claims which, but for the constitutional immunity of the state from suit, or of some statuory resrictions, inhibitions or limitations, could be maintained in the regular courts of the state. But no liability shall be imposed upon the state or any of its agencies by a determination of the court of claims approving a claim and recommending an award, unless the Legislature has previously made an appropriation for the payment of a claim subject only to the determination of the court. The court shall consider claims in accordance with sections sixteen to twenty, inclusive, of this article.

Except as is otherwise provided in this article, a claim shall be instituted by the filing of notice with the clerk. Each claim shall be considered by three judges. If, after consideration, the court finds that a claim is just and proper, it shall so determine and shall file with the clerk a brief statement of its reasons. If the determination of the court is not unanimous, the reasons

of the dissenting judge shall be separately stated. A claim so filed shall be an approved claim. The court shall also determine the amount that should be paid to the claimant, and shall itemize this amount as an award, with the reasons therefor, in its statement filed with the clerk. In determining the amount of a claim, interest shall not be allowed unless the claim is based upon a contract which specifically provides for the payment of interest.

Sec. 13. *The Jurisdiction of the Court.*—The jurisdiction of the court, except for the claims excluded by section fourteen, shall extend to the following matters:

1. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state or any of its agencies which the state as a sovereign commonwealth should in equity and good conscience discharge and pay.

2. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, which may be asserted in the nature of set-off or counter claim on the part of the state or any of its agencies.

3. The legal or equitable status, or both, of any claim referred to the court by the head of a state agency for an advisory determination.

Sec. 14. *Claims Excluded.*—The jurisdiction of the court shall not extend to any claim:

1. For loss, damage, or destruction of property or for injury or death incurred by a member of the militia or national guard when in the service of the state.

2. For injury to or death of an inmate of a state penal institution.

3. Arising out of the care or treatment of a person in a state institution.

4. For a disability or death benefit under chapter twenty-three of this code.

5. For unemployment compensation under chapter twenty-one-a of this code.

6. For relief or public assistance under chapter nine of this code.

7. With respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state.

Sec. 15. *Rules of Practice and Procedure.*—The court shall adopt and may from time to time amend rules of procedure, in accordance with the provisions of this article, governing proceedings before the court. Rules shall be designed to assure a simple, expeditious and inexpensive consideration of claims.

The court shall also adopt and may from time to time amend rules pertaining to persons appearing as representatives of claimants. Rules shall permit a claimant to appear in his own behalf; or to present his claim through a qualified representative. A representative shall be a person who, as further defined by the rules of the court, is competent to present and protect the interests of the claimant.

Under its rules, the court shall not be bound by the usual common law or statutory rules of evidence. The court may accept and weigh in accordance with its evidential value any information that will assist the court in determining the factual basis of the claim.

Sec. 16. *Regular Procedure.*—The regular procedure for the consideration of claims shall be substantially as follows:

1. The claimant shall give notice to the clerk that he desires to maintain a claim. Notice shall be in writing and shall be in sufficient detail to identify the claimant, the circumstances giving rise to the claim, and the state agency concerned, if any. The claimant shall not otherwise be held to any formal requirement of notice.

2. The clerk shall transmit a copy of the notice to the state agency concerned. The state agency may deny the claim, or

may request a postponement of proceedings to permit negotiations with the claimant. If the court finds that a claim is *prima facie* within its jurisdiction, it shall order the claim to be placed upon its regular docket for hearing.

3. During a period of negotiations and pending hearing, the state agency and the attorney general's office shall, if possible, reach an agreement with the claimant regarding the facts upon which the claim is based so as to avoid the necessity for the introduction of evidence at the hearing. If the parties are unable to agree upon the facts, an attempt shall be made to stipulate the questions of fact in issue.

4. The court shall so conduct the hearing as to disclose all material facts and issues of liability. Any judge may examine or cross-examine witnesses. The court may call witnesses or require evidence not produced by the parties; may stipulate the questions to be argued by the parties; and may continue the hearing until some subsequent time to permit a more complete presentation of the claim.

5. After the close of the hearing the court shall consider the claim and shall conclude its determination, if possible, within thirty days.

Sec. 17. *Shortened Procedure.*—The shortened procedure authorized by this section shall apply only to a claim possessing all of the following characteristics:

1. The claim does not arise under an appropriation for the current fiscal year.

2. The state agency concerned concurs in the claim.

3. The amount claimed does not exceed one thousand dollars.

4. The claim has been approved by the attorney general as one that, in view of the purposes of this article, should be paid.

The state agency concerned shall prepare the record of the claim consisting of all papers, stipulations and evidential documents required by the rules of the court. The record shall be filed with the clerk. The court shall consider the claim informally upon the record submitted. If the court determines that the claim should be entered as an approved claim and an award made, it shall so order and shall file its statement with the clerk. If the court finds that the record is inadequate, or that the claim should not be paid, it shall reject the claim. The rejection of a claim under this section shall not bar its resubmission under the regular procedure.

Sec. 18. *Advisory Determination Procedure.*—The governor or the head of a state agency may refer to the court for an advisory determination the question of the legal or equitable status, or both, of a claim against the state or one of its agencies. This procedure shall apply only to such claims as are within the jurisdiction of the court. The procedure shall be substantially as follows:

1. There shall be filed with the clerk the record of the claim including a full statement of the facts, the contentions of claimant, and such other materials as the rules of the court may require. The record shall submit specific questions for the court's consideration.

2. The clerk shall examine the record submitted and if he finds that it is adequate under the rules, he shall place the claim on a special docket. If he finds the record inadequate, he shall refer it back to the officer submitting it with the request that the necessary additions or changes be made.

3. When the claim is reached on the special docket, the court shall prepare a brief opinion for the information and guidance of the officer. The claim shall be considered informally and without hearing. A claimant shall not be entitled to appear in connection with the consideration of the claim.

4. The opinion shall be filed with the clerk. A copy shall be transmitted to the officer who referred the claim.

An advisory determination shall not bar the subsequent consideration of the same claim if properly submitted by, or on behalf of, the claimant. Such subsequent consideration, if undertaken, shall be *de novo*.

Sec. 19. *Claims Under Existing Appropriations.*—A claim arising under an appropriation made by the Legislature during the fiscal year to which the appropriation applies, and falling within the jurisdiction of the court, may be submitted by:

1. A claimant whose claim has been rejected by the state agency concerned or by the state auditor.

2. The head of the state agency concerned in order to obtain a determination of the matters in issue.

3. The state auditor in order to obtain a full hearing and consideration of the merits.

The regular procedure, so far as applicable, shall govern the consideration of the claim by the court. If the court finds that the claimant should be paid, it shall certify the approved claim and award to the head of the state agency, the state auditor, and the governor. The governor may thereupon instruct the auditor to issue his warrant in payment of the award and to charge the amount thereof to the proper appropriation. The auditor shall forthwith notify the state agency that the claim has been paid. Such an expenditure shall not be subject to further review by the auditor upon any matter determined and verified by the court.

Sec. 20. *Claims Under Special Appropriations.*—Whenever the Legislature makes an appropriation for the payment of claims against the state, then accrued or arising during the ensuing biennium, determination of claims and the payment thereof may be made in accordance with this section. But this section shall apply only if the Legislature in making its appropriation specifically so provides.

The claim shall be considered and determined by the regular or shortened procedure, as the case may be, and the amount

of the award shall be fixed by the court. The clerk shall certify each approved claim and award to the governor. The clerk shall issue his requisition to the auditor who shall issue his warrant to the treasurer in favor of the claimant. The auditor shall issue his warrant without further examination or review of the claim except for the question of a sufficient unexpended balance in the appropriation.

Sec. 21. *Limitations of Time.*—The court shall not take jurisdiction over a claim unless the claim is filed within five years after the claim might have been presented to such court. If, however, the claimant was for any reason disabled from maintaining the claim, the jurisdiction of the court shall continue for two years after the removal of the disability. With respect to a claim arising prior to the adoption of this article, the limitation of this section shall run from the effective date of this article: *Provided, however,* That no such claim as shall have arisen prior to the effective date of this article shall be barred by any limitation of time imposed by any other statutory provision if the claimant shall prove to the satisfaction of the court that he has been prevented or restricted from presenting or prosecuting such claim for good cause, or by any other statutory restriction or limitation.

Sec. 22. *Compulsory Process.*—In all hearings and proceedings before the court, the evidence of witnesses and the production of documentary evidence may be required. Summons may be issued by the court for appearance at any designated place of hearing. In case of disobedience to a summons or other process, the court may invoke the aid of any circuit court in requiring the evidence and testimony of witnesses, and the production of books, papers, and documents. Upon proper showing, the circuit court shall issue an order requiring witnesses to appear before the court of claims; produce books, papers and other evidence; and give testimony touching the matter in question. A person failing to obey the order may be punished by the circuit court as for contempt.

Sec. 23. *Inclusion of Awards in Budget.*—The clerk shall certify to the director of the budget on or before the twentieth day of November of each year next preceding the year in which the Legislature meets in regular session, a list of all awards recommended by the court to the Legislature for appropriation. The clerk may certify supplementary lists to the board of public works to include subsequent awards made by the court. The board of public works shall include all awards so certified in its proposed budget bill transmitted to the Legislature.

Sec. 24. *Records to Be Preserved.*—The record of each claim considered by the court, including all documents, papers, briefs, transcripts of testimony and other materials, shall be preserved by the clerk and shall be made available to the Legislature or any committee thereof for the re-examination of the claim.

Sec. 25. *Reports of the Court.*—The clerk shall be official reporter of the court. He shall collect and edit the approved claims, awards and statements, and shall prepare them for publication and submission to the Legislature in the form of a biennial report.

Claims and awards shall be separately classified as follows:

1. Approved claims and awards not satisfied but referred to the Legislature for final consideration and appropriation.

2. Approved claims and awards satisfied by payments out of regular appropriations for the biennium.

3. Approved claims and awards satisfied by payment out of a special appropriation made by the Legislature to pay claims arising during the biennium.

4. Claims rejected by the court with the reasons therefor.

5. Advisory determinations made at the request of the governor or the head of a state agency.

The court may include any other information or recommendations pertaining to the performance of its duties.

The court shall transmit its biennial report to the governor who shall transmit a copy thereof to the presiding officer of each house of the Legislature. The biennial reports of the court shall be published by the clerk as a public document.

Sec. 26. *Fraudulent Claims.*—A person who knowingly and wilfully presents or attempts to present a false or fraudulent claim, or a state officer who knowingly and wilfully participates or assists in the preparation of a false or fraudulent claim, shall be guilty of a misdemeanor. A person convicted, in a court of competent jurisdiction. of violation of this section shall be fined not more than one thousand dollars or imprisoned for not more than one year, or both, in the discretion of such court. If the convicted person is a state officer he shall, in addition, forfeit his office.

Sec. 27. *Repealer.*—Section three, article three, chapter twelve of the official code, one thousand nine hundred thirty-one, is hereby repealed. Any other provision of law in conflict with the provisions of this act is hereby repealed

Sec. 28. *Provisions Severable.*—If any part of this act is held unconstitutional, the decision shall not affect any portion of the act which remains. The remaining portions shall be in full force and effect as if the portion declared unconstitutional had never been a part of the act.

Rules of Practice and Procedure

OF THE

STATE COURT OF CLAIMS

(Adopted by the Court July 30, 1941, and
Revised July 19, 1945)

TABLE OF RULES

Rules of Practice and Procedure

Rules of Practice and Procedure

OF THE

State Court of Claims

RULE 1. CLERK'S OFFICE, LOCATION AND HOURS.

The office of the Clerk of the Court shall be at the State Capitol, in the City of Charleston, and shall be kept open in charge of the Clerk, or some competent employee of the Court under the direction of the Clerk, each weekday, except legal holidays, for the purpose of receiving notices of claims and conducting the business of the office, during the same business hours as other public offices in the State Capitol are kept open, except when otherwise required by the Court during a regular or special session of the Court.

RULE 2. CLERK, CUSTODIAN OF PAPERS, ETC.

The Clerk shall be responsible for all papers, claims or demands filed in his office; and will be required to properly file, in an index for that purpose, any paper, pleading, document, or other writing filed in connection with any claim or demand. The Clerk shall also properly endorse all such papers, claims, or demands showing the title of the claim or demand, the number of the same, and such other data as may be necessary to properly connect and identify the document or writing, claim or demand.

RULE 3. FILING PAPERS.

(a) Communications addressed to the Court or Clerk and all notices, petitions, answers and other pleadings, all reports, exhibits, depositions, transcripts, orders and other papers or documents received or filed in the office kept by the Clerk of this Court, shall be endorsed by him showing the date of the receipt or filing thereof.

(b) The Clerk, upon receipt of a notice of claim, shall enter of record in the docket book, indexed and kept for that purpose, the name of the claimant, whose name shall be used as the title of the case, and a case number shall be assigned accordingly.

RULE 4. RECORDS.

The Clerk shall keep the following record books, suitably indexed in the names of claimants and other subject matter:

(1) Minute and Order Book, in which shall be recorded at large, on the day of their filing, all orders or recommendations made by the Court in each case or proceeding, and the Minutes of all official business sessions of the Court, including Rules of Procedure, orders paying salaries of members and expenses of the Court, and the salaries, compensations and expenses of its employees, and all orders pertaining to the organization and administration of the Court, together with such other orders as may be directed to be entered therein by the Court.

(2) Docket Book in which shall be entered each case or claim made and filed, with a file or case number corresponding to the number of the case, together with brief chronological notations of the proceedings had in each case.

(3) Financial Ledger, in which shall be entered chronologically, all administrative expenditures of the Court under suitable classifications.

RULE 5. FORM OF CLAIMS.

Notices of all claims and demands must be filed with the Clerk of the Court and may be by a written statement, petition, declaration, or any writing without regard to form, which sufficiently sets forth the nature of the claim or demand, the facts upon which it is based, the time and place of its origin, the amount thereof, and the State Agency, if any, that is involved. Technical pleadings shall not be required. The Court, however, reserves the right to require further information before

hearing, when, in its judgment, justice and equity may require. It is recommended that notices of claims be furnished in triplicate.

RULE 6. COPY OF NOTICE OF CLAIMS TO ATTORNEY GENERAL AND STATE AGENCY.

Upon receipt of a notice of claim or demand to be considered by the Court, the Clerk shall forthwith transmit a copy of the notice to the State Agency concerned, if any, and a copy thereof to the office of the Attorney General of the State, and the Clerk shall make a note of the time of said delivery of such notice to the Attorney General's office.

RULE 7. JURISDICTION, *PRIMA FACIE.*

A reasonable time before the printing of the docket, as provided by these rules, the Court will examine each claim to ascertain whether it is *prima facie* within its jurisdiction. If it is found that the Court has jurisdicton, the claim will then be ordered to be placed upon the docket. If it is found that the Court is wihout jurisdiction, the claimant or representative presenting the claim will be notified accordingly, by letter from the Clerk; leave being granted the claimant or his representative to appear before the Court at any time during a regular or special session thereof, to show cause, if any, why the Court has or should assume jurisdiction of the claim.

RULE 8. PREPARATION OF HEARING DOCKET.

The Clerk shall prepare fifteen days previous to the regular terms of the Court a printed docket listing all claims and demands that are ready for hearing and consideration by the Court, and showing the respective dates, as fixed by the Court, for the hearings thereof. The said claims or demands shall appear on the said docket in the order in which they were filed in the office of the Clerk. The Court, however, reserves the right to rearrange or change the order of hearing claims or demands at any regular term, when in its judgment such rearrangement or change would help to expedite and carry on the work of

the term. As soon as the docket is completed and printed, a copy thereof shall be mailed to the address of record of each claimant or his representatives of record, and a copy furnished the office of the Attorney General.

RULE 9. PROOF, AND RULES GOVERNING TESTIMONY.

(a) Claims asserted against the State, including all the allegations in a notice of claim, are treated as denied, and must be established by the claimant with satisfactory proof, or proper stipulation as provided under Rule 11 of the Court, before an award will be made in any case. Affidavits are not admissible as proof of claims under the regular procedure.

(b) While it is not intended or contemplated that the strict rules of evidence governing the introduction of testimony shall control in the hearing or presentation before the Court of any claim or demand; and while, so far as possible, all technicalities shall be waived, yet the Court reserves the right to require or outline from time to time certain formalities to be required in presenting testimony in support of a claim or in opposition thereto, and to preserve the proper sequence of procedure in the hearing of each individual claim, as the circumstances may demand or require. Such requirements or formalities may be announced from time to time during sessions of the Court.

(c) Under its rules, the Court shall not be bound by the usual common law or statutory rules of evidence. The Court may accept and weigh, in accordance with its evidential value, any information that will assist the Court in determining the factual basis of the claim.

RULE 10. CLAIMS, ISSUES ON.

In order to promote a simple, expeditious and inexpensive consideration of the claim made, the Attorney General shall within ten days after a copy of the notice has been furnished his office file with the clerk a formal or informal statement or notice in writing, either denying the claim, requesting postponement

of proceedings to permit negotiations with the claimant, or otherwise setting forth reasons for further investigation of the claim. otherwise after said ten-day period the Court may order the claim placed upon its regular docket for hearing, if found to be a claim *prima facie* within its jurisdiction.

RULE 11. STIPULATIONS OF FACT, INTERROGATORIES TO DETERMINE.

(a) It shall be the duty of claimants or their attorneys or representatives, in claims under the regular procedure, to negotiate with the office of the Attorney General so that the claimant and the State Agency and the Attorney General may be ready at the beginning of the hearing of a claim to read, if reduced to writing, or to dictate orally, if not reduced to writing, into the record such stipulations, if any, as the parties may have been able to agree upon, as for example, such factual data as the following if material and applicable to the particular claim:

The control and jurisdiction over, location, grade, width, type of surface and condition of particular roads, right of ways and bridges; exact or approximate dates; identities of persons; identity, description and ownership of property; and any and all other evidential facts directly involved or connected with the claim, without regard to the foregoing enumeration of data, and which the parties may be able properly and definitely to agree upon and stipulate, for the purposes of expediting the hearing, simplifying and shortening the transcript or record of the claim and to facilitate the labour of the Court in arriving at and resolving the controverted questions and issues involved; and to the further end, where the claim is small, to avoid, if possible, the necessity for the introduction of evidence.

(b) Where there is a controversy between a claimant and any State Agency, the Court may require each party to reduce the facts to writing, and if the parties are not in agreement as to the facts, the Court may stipulate the questions of fact in issue and require written answers to the said stipulated questions.

RULE 12. CLAIMANTS, APPEARANCES.

Any claimant may appear in his own behalf or have his claim presented through a duly qualified representative. The representative may be either an attorney-at-law, duly admitted as such to practice in the courts of the State of West Virginia, or one who has the qualifications, in the judgment and opinion of the Court, to properly represent and present the claim of a claimant. Where the representative is not an attorney-at-law, then such representative must have the written authority of the claimant to act as such.

RULE 13. BRIEFS, NUMBER OF COPIES.

(a) Claimants or their duly authorized representatives, as well as the Attorney General or the State Agency concerned, may file with the Court for its consideration a brief on any question involved, provided a copy of said brief is also presented to and furnished the opposing party or counsel. The Court may designate the time within which reply briefs may be filed.

(b) All briefs filed with, and for the use of, the Court shall be in quadruplicate—original and three copies. As soon as any brief is received by the Clerk he shall file the original in the Court file and deliver the three copies, one each, to the Judges of the Court.

RULE 14. AMENDMENTS TO NOTICES, PETITIONS, ETC.

Amendments to any notice, petition, or other pleading may be made by filing a new statement of claim, petition, or such other pleading, unless the Court otherwise directs.

RULE 15. CONTINUANCES; DISMISSAL FOR FAILURE TO PROSECUTE.

(a) After claims have been set for hearing continuances are looked upon by the Court with disfavor, but may be allowed *when good cause is shown therefor*, or when the State and the claimant jointly move for a continuance.

(b) A party desiring a continuance should file a motion showing good cause therefor, *before the first day of the term,* or otherwise at the earliest possible date, so that if the motion be granted the opposing party may be notified, if possible, in time to obviate the attendance of witnesses on the day set for hearing.

(c) Whenever any claim regularly filed shall not be moved for trial by the claimant during the time that four regular terms of Court have been held at which the claim might have been prosecuted, and the State shall be ready to proceed with the trial thereof, the Court may, upon its own motion or that of the State, dismiss the claim unless sufficient reason appear or be shown by the claimant why such claim cannot be tried.

(d) Whenever a claimant shall fail to appear and prosecute his claim on the day set for hearing and shall not have communicated with the Clerk or the Court prior thereto, advising of his inability to attend and the reason therefor, and if it further appear that the claimant or his representative had sufficient notice of the docketing of the claim for hearing, the Court may, upon its own motion or that of the State, dismiss the claim.

(e) Within the discretion of the Court, no order dismissing a claim under either of the two preceding sections of this rule shall be vacated nor the hearing of such claim be reopened except by a notice in writing filed not later than the end of the next regular term of Court, supported by affidavits showing sufficient reason why the order dismissing such claim should be vacated, the claim reinstated and the trial thereof permitted.

RULE 16. ORIGINAL PAPERS NOT TO BE WITHDRAWN; EXCEPTIONS.

No original paper in any case shall be withdrawn from the Court record, except upon special order of the Court, or one of the Judges thereof in vacation, and except when an official of a State Department is testifying from an original record of his department a certified copy of the original record of such department may be filed in the place and stead of the original without special order of the Court.

RULE 17. WITHDRAWAL OR DISMISSAL MOTION BY PARTY FILING CLAIM.

(a) Any claimant may move to withdraw his claim and the same shall be dismissed. Should the claimant later refile the claim, the Court shall consider its former status, such as previous continuances and any other matters affecting its standing, and may redocket or refuse to redocket the claim as in its judgment justice and equity may require under the circumstances.

(b) Any department or state agency, having filed a claim for the Court's consideration, under either the advisory determination procedure or the shortened procedure provision of the Court Act, may move to withdraw the claim and the same shall be dismissed, but without prejudice to the right of the claimant involved to file the claim under the regular procedure.

RULE 18. WITNESSES.

(a) For the purpose of convenience and in order that proper records may be preserved claimants and State Departments desiring to have subpoenas for witnesses shall file with the Clerk a memorandum in writing giving the name and number of the claim and setting forth distinctly the names of such witnesses, and thereupon such subpoenas shall be issued and delivered to the person calling therefor or mailed to the person designated.

(b) Requests for subpoenas for witnesses should be furnished to the Clerk well in advance of the hearing date so that such subpoenas may be issued in ample time before the hearing.

(c) The payment of witness fees, and mileage where transportation is not furnished, of any witness subpoenaed by or at the instance of either the claimant or the respondent state agency, shall be the responsibility of the party by whom or at whose instance such witness is subpoenaed.

RULE 19. DEPOSITIONS.

(a) Depositions to be read as part of the record in any claim under the regular procedure shall not be taken, recognized or allowed except in accordance with this Rule of the Court.

(b) Before any deposition shall be taken, permission shall be obtained from the Court if in session, or from the Presiding Judge, or one of the other regular Judges in the vacation of the Court. Application for such permission shall be made in writing and show good and sufficient reason why the designated witnesses, whose depositions are sought to be taken, cannot appear and testify before the Court when such claim shall come up in regular order for hearing and investigation.

(c) If such permission is granted to take the depositions of any designated witnesses, reasonable notice of the time and place shall be given the opposite party or counsel, and the party taking such depositions shall pay the costs thereof and file an original and three copies of such depositions with the Court. Extra copies of exhibits will not be required; however, it is suggested that where exhibits are not too lengthy and are of such a nature as to permit it, they should be read into the deposition.

RULE 20. REHEARINGS AND REOPENINGS OF CLAIMS AFTER DETERMINATION.

(a) Rehearings may not be allowed except where good cause is shown why the case should be reconsidered. Motions for rehearings may be entertained and considered *ex parte*, unless the Court otherwise directs, upon the petition and brief filed by the party seeking the rehearing. Such petition and brief shall be filed within 30 days after notice of the Court's determination of the claim, and the filing of the Court's opinion therein, unless good cause be shown why the time should be extended.

(b) Unless the petitioner expressly shall seek that the case also be reopened upon the rehearing for the introduction of new testimony, and unless such request for reopening the case appears proper and is supported by affidavits showing good cause why the case should be reopened, such petition shall be treated only as seeking a reconsideration of the claim upon the record already made and before the Court. If a rehearing is allowed it shall be only for the purpose of a reconsideration and redetermination

of the case upon the record already before the Court unless the Court, in its discretion shall, by its order, otherwise direct.

RULE 21. RECORDS OF SHORTENED PROCEDURE CLAIMS SUBMITTED BY STATE AGENCIES.

When claims are submitted under the shortened procedure section of the Court Act, concurred in by the head of the department and approved for payment by the Attorney General, the record thereof, in addition to copies of correspondence, bills, invoices, photographs, sketches or other exhibits, should contain a full, clear and accurate statement, in narrative form, of the facts upon which the claim is based. The facts in such record, among other things which may be peculiar to the particular claim, should show as definitely as possible that:

(1) The claimant did not through neglect, default or lack of reasonable care, cause the damage of which he complains. In other words, it should appear he was innocent or without fault in the matter:

(2) The department, by or through neglect, default or failure to use reasonable care under the circumstances caused the damage to claimant, so that the State in justice and equity should be held liable.

(3) The amount of the claim should be itemized and supported by a paid invoice, or other report itemizing the damages, and vouched for as to correctness and reasonableness by some one in authority in the department.

The State Agency shall ascertain that it and the claimant are in agreement as to the amount of the claim as proposed to be presented to the Court. Before the record of the claim is filed with the Clerk it must bear the concurrence of the head of the State Agency concerned and the approval for payment by the Attorney General.

OPERATING EXPENSES OF THE COURT

REPORT OF THE CLERK OF THE COURT OF CLAIMS, ON THE COURT'S EXPENDITURES FOR THE FISCAL YEAR JULY 1, 1944 TO JUNE 30, 1945, INCLUSIVE.

(SECOND YEAR OF 1943-1945 BIENNNIUM).

PERSONAL SERVICES

Judges' per diem	$6,750.00	
Court Reporter's per diem	485.00	
All other personal services	2,951.33	
Total		$10,186.33

CURRENT EXPENSES

Judges' expenses	1,435.63	
Office supplies, dockets, telephone, ice, record books, moving	363.43	
Transcripts of evidence	910.50	
Court Report No. 2 (1000 copies)	2,000.26	
Total		4,709.82

EQUIPMENT

Fixtures	211.70	
Law Books	891.30	
Total		1,103.00
Total expenditures for the year		$15,999.15
Unexpended balance for the year		671.86
Total		$16,671.01

Total appropriation for the year	$14,650.00
Revived and transferred from preceding year of biennium to expense account chiefly to pay cost of printing Court Report No. 2	2,021.01
Total	$16,671.01

OPERATING EXPENSES OF THE COURT

REPORT OF THE CLERK OF THE COURT OF CLAIMS, ON THE COURT'S EXPENDITURES FOR THE FISCAL YEAR JULY 1, 1945 TO JUNE 30, 1946, INCLUSIVE. (FIRST YEAR OF 1945-1947 BIENNIUM).

PERSONAL SERVICES		
Judges' per diem	$5,180.00	
Court Reporter's per diem	285.00	
Clerk of the Court	3,600.00	
All other personal services	2,650.00	
Total		$11,715.00
CURRENT EXPENSES		
Judges' expenses	1,621.71	
Office supplies, dockets, telephone, ice and other items	283.92	
Transcripts of evidence	1,187.55	
Total		3,093.18
EQUIPMENT		
Fixtures	114.75	
Law Books	123.80	
Total		238.55
Total expenditures for the year		15,046.73
Unexpended balance for the year		5,128.27
Total appropriations for the year		20,175.00

SUMMARY OF CLAIMS

Claims filed and awards made from the organization of the Court, July 1, 1941 to December 1, 1946:

Number of claims filed	560
Amount claimed, in all claims reported	$1,281,710.29
Amount of all awards, reported in Court Reports Nos. 1, 2 and 3	183,598.20
Awards certified to 1943 Legislature	102,127.39
Awards approved by 1943 Legislature	102,127.39
Awards certified to 1945 Legislature	57,093.63
Awards approved by 1945 Legislature	53,522.66
*Awards disallowed by 1945 Legislature	3,570.97
Awards certified to 1947 Legislature, to 12-1-46 reported herein	23,304.18
Awards satisfied out of regular appropriations, not certified to the Legislature, but reported in Court Reports Nos. 1, 2 and 3	1,073.00

NOTES:

*(1). The 1945 Legislature failed to allow the following two awards, both versus the State Road Commission:
No. 354—*Sam G. Polino & Co.*, $2,070.97 2 Ct. Claims Reports 354.
No. 208—*Lon E. Upton*. $1,500.00 2 Ct. Claims Reports 134.

(2). As to the requirement that the Legislature, when appropriating money to pay a claim, make an express declaration or finding of fact that a moral obligation exists on the part of the State, see the opinion of the State Supreme Court of Appeals in *Adkins v. Sims* 127 W. Va. 786; 34 S. E. 2d 585.

REPORT OF THE COURT OF CLAIMS
For Period December 1, 1944 to November 30, 1946

(1-a) Approved claims and awards referred to the 1945 Legislature, for the period from December 1, 1944, to February 2, 1945, after Report No. 2 had gone to press; allowed by the 1945 Legislature; opinions therein included in this Report:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
452	Adams, Phillip	State Road Commission	$ 92.28	$ 92.28	February 2, 1945
447	Africano, John	State Road Commission	75.00	75.00	February 1, 1945
428	Atkins, R. C.	State Road Commission	15.00	15.00	January 11, 1945
420	Bennett, Jacob F	State Road Commission	312.00	312.00	January 11, 1945
421	Bennett, Jacob F. (The latter amount o 936.00 to be paid in monthly install-ments of $52. each fr-n 7-1-45 to 12-31-46).	State Road Commission	936.00	936.00	January 11, 1945
455	Bowles, Dr. Roy O.	State Road Commission	7.50	7.50	February 1, 1945
429	Bowman, Doris C., infant by Mary Margaret Gilbert, her next friend	State Road Commission	72.00	72.00	January 12, 1945
433	Brown, Clarence	State Road Commission	1,500.00	250.00	February 2, 1945
445	Clark, Okey	State Road Commission	16.75	16.75	January 18, 1945
458	Columbian Carbor Company	State Road Commission	30.62	30.62	February 2, 1945
427	Coonts, Gene	State Road Commission	15.00	15.00	January 15, 1945
436	Crihfield, Nathan	State Road Commission	451.00	451.00	January 19, 1945
446	Custer, Kathryn E.	State Road Commission	42.84	42.84	January 18, 1945

REPORT OF THE COURT OF CLAIMS (Continued)

(1-a) Approved claims and awards referred to the 1945 Legislature, for the period from December 1, 1944, to February 2, 1945, after Report No. 2 had gone to press; allowed by the 1945 Legislature; opinions therein included in this Report:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
444	Dempsey, H. C.	State Road Commission	149.00	149.00	January 18, 1945
434	Emerick, Mary Alice, infant, by William P. Bradford, her next Friend	State Road Commission	500.00	100.00	February 2, 1945
396	Fairchild, Roy, trustee fo Hotcoal Coal Co.	State Auditor	40.00	40.00	January 19, 1945
441	Gemrose, Bettie T.	State Road Commission	69.62	69.62	January 22, 1945
442	Haller. I. Frank	State Road Commission	39.99	39.99	January 12, 1945
457	Headley, Jack	State Road Commission	8.16	8.16	February 2, 1945
451	Hoard, Mrs. Sallie	State Road Commission	15.00	15.00	February 2, 1945
431	Halbert, A. R.	State Road Commission	179.93	179.93	January 15, 1945
443	Hranka, F. J.	State Road Commission	19.50	19.50	January 18, 1945
453	Hughart, Mayford	State Road Commission	32.13	32.13	February 1, 1945
438	Jarrell, Roy	State Road Commission	34.82	34.82	January 15, 1945
422	McClung, Alice E.	State Road Commission	720.00	720.00	January 23, 1945

REPORT OF THE COURT OF CLAIMS (Continued)

(1-a) Approved claims and awards referred to the 1945 Legislature, for the period from December 1, 1944, to February 2, 1945, after Report No. 2 had gone to press; allowed by the 1945 Legislature; opinions therein included in this Report:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
	(To be paid in monthly installments of $30.00 each from 1-1-45 to 12-31-46).				
409	McKinney, J. A.	State Road Commission	200.00	150.00	January 18, 1945
435	Means, J. F.	State Road Commission	50.00	50.00	January 15, 1945
430	Neff, J. E.	State Road Commission	40.80	40.80	January 12, 1945
448	Ofsay, Sam	State Road Commission	75.00	75.00	February 1, 1945
450	Ohio Valley Bus Company	State Road Commission	57.82	57.82	February 2, 1945
424	Pratt, Effie Savage (To be paid in monthly installments of $10.00 each from 1-1-45 to 12-31-46)	State Road Commission	240.00	240.00	January 22, 1945
425	Preiser, B., Co. Inc.	State Board of Control	50.00	50.00	January 19, 1945
432	Ragase, Robert	State Road Commission	4,000.00	1,500.00	February 2, 1945
440	Robertson, R. O.	State Road Commission	161.26	161.26	January 15, 1945
454	Spence, L. D.	State Road Commission	97.60	97.60	February 2, 1945
423	Stewart, Lottie	State Road Commission	10.00	10.00	January 23, 1945
		Totals	**10,356.62**	**6,156.62**	

REPORT OF THE COURT OF CLAIMS (Continued)

(1-b) Approved claims and awards not satisfied but referred to the 1947 Legislature for final consideration and appropriation:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
500	Aetna Casualty and Surety Co.	State Road Commission	$30.28	$30.28	March 21, 1946
489	Anderson, Melvin O.	State Conservation Commission	91.27	91.27	October 16, 1945
548	Appalachian Electric Power Co.	State Road Commission	252.06	252.06	November 7, 1946
479	Archer, H. D.	State Road Commission	13.60	13.60	October 15, 1945
495	Baltimore & Ohio Railroad Co.	State Road Commission	1,850.00	1,850.00	May 8, 1946
531	Berkeley Printing & Publishing Co.	State Auditor	462.00	462.00	July 17, 1946
553	Bond, J. F.	State Road Commission	150.00	150.00	October 19, 1946
551	Buchanan, Herman	State Road Commission	85.87	85.87	October 19, 1946
481	Burke, Leo R.	State Road Commission	9.44	9.44	October 15, 1945
521	Cashman, Harold H., M. D.	State Board of Control	.....	2,000.00	November 14, 1946
527	Charleston Mail Association	State Health Department	123.20	123.20	May 3, 1946
512	Checker White Cab, Inc.	State Road Commission	50.00	50.00	January 16, 1946
514	Clark, Martha	State Road Commission	200.00	200.00	April 9, 1946
476	Cogar, Bobby L., infant, by Ward Huffman, his guardian	State Board of Control	10,000.00	3,000.00	December 17, 1945
486	Colonial Glass Co.	State Road Commission	335.35	335.35	October 16, 1945
469	Cremeans, Frances	State Road Commission	1,500.00	300.00	July 19, 1945
466	Davis, Harry E.	State Conservation Commission	29.64	29.64	July 12, 1945
515	Davis Trust Co., adm. estate of Lucy Ward, deceased	State Board of Control	10,000.00	2,500.00	July 16, 1946

REPORT OF THE COURT OF CLAIMS (Continued)

(1-b) Approved claims and awards not satisfied but referred to the 1947 Legislature for final consideration and appropriation:

No.	Name of Claimant	Name of Respondent	Amount Awarded	Amount Claimed	Date of Determination
552	DeMilia, Alfred F.	State Department Probation and Parole	950.00	300.00	November 7, 1946
501	Ellison, Roy L.	State Road Commission	45.90	45.90	January 30, 1946
529	Fankhouser, Mrs. R. R.	State Road Commission	20.00	20.00	April 10, 1946
528	Fankhouser, Mrs. R. R., Admx. of estate of Russel R. Fankhouser, deceased	State Road Commission	238.05	238.05	April 10, 1946
532	Gantzer, William G.	State Road Commission	47.75	47.75	July 8, 1946
480	Garver, B. F.	State Road Commission	52.94	52.94	October 15, 1945
462	Halstead, E. H.	State Road Commission	13.01	13.01	October 15, 1945
482	Hamrick, Elvin	State Road Commission	80.47	80.47	October 16, 1945
472	Henry, Blaine D.	State Road Commission	196.75	196.75	July 10, 1946
496	Hudson, Charles A.	State Road Commission	15.30	15.30	January 15, 1946
509	Jamerson, T. L.	State Road Commission	3.06	3.06	January 15, 1946
461	Johnson, Mildred, infant, by Howard E. Johnson, her next friend	State Road Commission	591.00	591.00	July 12, 1945
490	King, Bessie L.	State Road Commission	127.50	51.00	October 9, 1945
498	King, Leah	State Road Commission	76.50	76.50	January 14, 1946

REPORT OF THE COURT OF CLAIMS (Continued)

(1-b) Approved claims and awards not satisfied but referred to the 1947 Legislature for final consideration and appropriation:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
555	Lemasters, Rose	State Road Commission	72.75	72.75	October 19, 1946
470	Main Street News	State Road Commission	40.75	40.75	July 12, 1945
545	Marks, Jimmie, infant, by Charlie Marks, his next friend	State Road Commission	500.00	400.00	November 7, 1946
484	Mylius, L. C.	State Road Commission	46.95	46.95	October 16, 1945
492	McClure, Earl C.	State Road Commission	60.00	60.00	October 9, 1945
520	McCuskey, Dr. Wm. C.	State Health Department	383.75	383.75	April 9, 1946
491	McVey, E. Y.	State Department of Mines	106.71	106.71	December 18, 1945
460	Neal, William H., Jr.	State Road Commission	200.00	200.00	July 12, 1945
493	Neel, W. C.	State Road Commission	34.28	34.28	October 9, 1945
471	Pappalardo, Lui	State Road Commission	30.60	30.60	July 12, 1945
508	Queen, Clarence	State Road Commission	49.27	49.27	January 15, 1946
513	Randolph, Russell	State Road Commission	300.00	100.00	April 15, 1946
522	Reynolds, James	State Board of Control	5,000.00	550.00	May 8, 1946
534	Roberts, Le Roy	State Board of Control	3,341.52	3,341.52	July 19, 1946
463	Ronk, Francis	State Road Commission	123.44	123.44	July 12, 1945
465	Shafer, Hazel M.	State Road Commission	24.38	24.38	July 12, 1945

REPORT OF THE COURT OF CLAIMS (Continued)

(1-b) Approved claims and awards not satisfied but referred to the 1947 Legislature for final consideration and appropriation:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
378	Shepherd, Elma	State Department of Public Assistance	925.00	865.00	December 17, 1945
494	Smith, Cleo	State Road Commission	115.67	115.67	January 15, 1946
549	Stukey, Charles A.	State Road Commission	24.48	24.48	October 19, 1946
467	Utterback, A. W.	State Road Commission	1,500.00	500.00	July 19, 1945
468	Utterback, Mrs. A. W.	State Road Commission	15,000.00	2,000.00	July 19, 1945
535	Valvoline Pipe Lines Co.	State Road Commission	95.19	95.19	July 9, 1946
550	Van Camp, E. L.	State Road Commission	25.00	25.00	October 19, 1946
377	Wilson, Virginia	State Department of Public Assistance	960.00	900.00	Dec. 17, 1945
		Totals	$56,600.68	$23,304.18	

REPORT OF THE COURT OF CLAIMS (Continued)

(2) Approved claims and awards satisfied by payments out of regular appropriations for the biennium:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
517	Lanham, James G.	State Road Commission	450.00	450.00	May 8, 1946

(3) Approved claims and awards satisfied by payment out of a specia appropriation made by the Legislature to pay claims arising during the biennium: (None.)

(4) Claims rejected by the Court:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
511	Appalachian Electric Power Co.	State Road Commision	252.06	Denied	January 23, 1946
487	Arrick, Ina	State Board of Cortrol	269.61	Denied	December 18, 1945
419	Athey-Brooks Motors, Inc.	State Road Commssion	668.25	Denied	February 2, 1945
474	Brady, Henry R.	State Road Comnission	15,000.00	Denied	April 18, 1946
405	Brann, O. P.	State Road Commission	150.00	Denied	July 26, 1945
483	Charlton, Pauline L., admx. estate of Kenneth O. Charlton, deceased	State Road Commission	11,150.00	Denied	April 29, 1946
402	Coy, George, Jr., infant, by George Coy., Sr., his next friend	State Board of Control	5,000.00	Dismissed	January 24, 1945

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
503	Darlington, B. F.	State Road Commission	1,000.00	Denied	June 17, 1946
504	Darlington, Margaret	State Road Commission	5,000.00	Denied	June 17, 1946
505	Darlington, Margaret Ann	State Road Commission	500.00	Denied	June 17, 1946
439	Dillon, James	State Road Commission	... ..	Dismissed	June 18, 1945
408	Charles Fuller, infant	State Road Commission	5,304.50	Withdrawn	October 19, 1945
407	R. H. Fuller	State Road Commission	528.65	Withdrawn	October 19, 1945
379	Garda, Jessie E.	State Department of Public Assistance	1,380.00	Denied	January 17, 1945
464	Garrett, Gilbert	State Road Commission	208.50	Withdrawn	July 9, 1945
510	Grogan, Dorothea	State Board of Control	40.00	Denied	April 29, 1946
477	Hagedorn, Harry W.	State Road Commission		Dismissed	July 20, 1945
541	Hendricks, Lee Roy	State Road Commission	681.50	Denied	November 13, 1946
519	Hutchinson, Joe M.	State Road Commission	1,196.96	Denied	May 1, 1946
525	Hutchison, Earle	State Road Commission	5,000.00	Denied	June 17, 1946
499	Jordon, W. B.	State Road Commission	...	Denied	May 7, 1946
426	Kattong, Mrs. John P. (Ida)	State Road Commission	150 00	Denied	July 26, 1945
543	Langford, Elsie B.	State Board of Control	10,000.00	Withdrawn	September 23, 1946

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
546	Lent, S. E.	State Road Commission	500.00	Denied	November 8, 1946
539	Logan, Nelvina, admx. of estate of J. H. Logan, deceased	State Road Commission	.....	Denied	July 23, 1946
327	Long, Hilda S.	State Tax Commissioner	308.65	Denied	January 16, 1945
326	Long, Jennie Eloise	State Tax Commissioner	308.65	Denied	January 16, 1945
324	Long, Joseph Harvey	State Tax Commissioner	617.31	Denied	January 16, 1945
325	Long, Paul Walker	State Tax Commissioner	308.65	Denied	January 16, 1945
556	Morgan, Mae	State Conservation Commission	825.00	Denied	November 18, 1946
530	Morrow, Margaret Gilpin	State Road Commission	5,000.00	Dismissed	July 17, 1946
497	McGhee, John B.	State Board of Control	255.98	Denied	January 29, 1946
540	McVey, E. Y.	State Department of Mines	1,650.00	Dismissed	July 18, 1946
488	Parsons, Bernard L.	State Board of Control	38.00	Denied	January 21, 1946
473	Peters, Eva	State Road Commission	219.30	Denied	January 22, 1946
518	Peters, Eva	State Road Commission	219.30	Denied	May 8, 1946
383	Queen Insurance Co. and Theresa Brindis	State Road Commission	243.43	Denied	February 2, 1945
524	Quick, Emma and Mildred and Harry Miller	State Road Commission	1,928.25	Denied	June 17, 1946

REPORT OF THE COURT OF CLAIMS (Continued)

(4) Claims rejected by the Court:

No.	Name of Claimant	Name of Respondent	Amount Claimed	Amount Awarded	Date of Determination
393	Robison, Achillis T.	State Road Commission	26,988.35	Denied	February 2, 1945
48	Richards, J. C.	State and Calhoun County Boards of Education	5,000.00	Dismissed	November 8, 1946
502	Sechini, Peter and Alice J.	State Road Commission	2,500.00	Denied	May 9, 1946
406	Smith, Betty Jane	State Road Commission	.....	Denied	January 11, 1945
459	Snee, William E.	State Tax Commissioner	578.35	Dismissed	June 18, 1945
404	State Construction Co.	State Tax Commissioner	3,008.90	Denied	February 2, 1945
478	Stoneking, Paul	State Road Commission	.....	Dismissed	July 20, 1945
475	Thompson, Lois	State Board of Control	5,000.00	Denied	July 27, 1945
311	Thrift, R. J., Jr.	State Auditor	1,735.00	Denied	January 16, 1945
507	Ward, Nancy Lynn	State Road Commission	10,000.00	Denied	June 17, 1946
506	Ward, William	State Road Commission	750.00	Denied	June 17, 1946
374	Yoak, R. G.	State Road Commission	7,070.00	Denied	January 15, 1945
		Total	$138,533.15		

(5) Advisory determinations made at the request of the Governor or the head of a state agency: (None).

NOTE: Subsections (1), (2), (3), (4), and (5), respectively, of the above table conform to and correspond with the similarly numbered subsections of Section 25 of the Court of Claims Law.

OPINIONS

TABLE OF CASES REPORTED

Cases Submitted and Determined in the Court of Claims in the State of West Virginia

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(No. 406—Claim denied)

BETTY JANE SMITH, Claimant

v.

STATE ROAD COMMISSION, Respondent

Opnion filed January 11, 1945

Where the evidence offered in support of a claim against the state fails to establish by a preponderance of proof its merit as a claim for which an appropriation should be made by the Legislature, an award will be denied.

E. W. Salisbury, for claimant;

W. Bryan Spillers, Assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

Driving a 1937 model Packard automobile, Mrs. Frank Warner Knight, wife of Corporal Gale Knight of the West Virginia department of public safety, left her home at New Cumberland, Hancock county, West Virginia, about eight o'clock on the morning of July 20, 1940, to visit her sister at West Union, Doddridge county, in said state. She was accompanied by claimant Betty Jane Smith, her daughter by a former marriage, at that time seventeen years of age. The distance between the two towns was approximately one hundred and twenty miles. The two ladies were the only occupants of

the automobile and sat in the front seat of the vehicle, which was driven by Mrs. Knight at an average rate of speed of about thirty-five miles per hour.

While driving on state route No. 18 in Tyler county, and when within one-half mile from the county line of Tyler and Doddridge counties, the automobile skidded, left the highway and went over a fifty-foot embankment on the right-hand side of the road. There were no witnesses to the accident. Claimant suffered a broken back. Dr. E. Bennette Henson, a bone and joint specialist of Charlston, made an examination of her condition on November 14, 1944. He "found she had a broken back—the residuals of a broken back in the dorsal spine, that is, the seventh and eighth dorsal vertebrae."

Claimant now seeks an award by way of damages for the injuries which she has received and asks that her hospital and doctor bills may be paid.

It is the contention of claimant that it was the legal duty of the state, acting by and through its road commission, to "keep and maintain said state public highway in a reasonably safe condition for vehicular traffic." She says that the road commission negligently and carelessly failed to keep said highway in a reasonably safe condition for vehicles to travel over and upon, in that employees of said road commission negligently and carelessly piled a large amount of loose gravel upon said highway at the point where the car in which she was a guest was being driven and that said employees negligently and carelessly failed to spread the gravel along and upon said public highway in a proper and safe manner and negligently and carelessly permitted said gravel to remain in a large pile. She attributes the cause of the accident to these alleged acts of negligence on the part of the road commission.

The evidence in the case is in sharp conflict. Corporal Knight, Mrs. Knight, his wife, claimant and Madge Schmidt, who had made her home in the Knight family for ten years, testified in unmistakable terms to the effect that there was a large pile of gravel on the right-hand side of the road and that by reason of

the car running into it the accident occurred. Mrs. Knight, mother of claimant and driver of the automobile, said: "Well, as I hit this gravel my car swerved to the right, and I, of course, tried to keep it in the road, and it swerved to the left and started to skid sideways and almost upset in the middle of the road, and then—I don't know what made it—I think I must have got my foot on the gas thinking I was on the brake." After the occurrence of the accident Corporal Knight was notified at New Cumberland and immediately drove to the scene. He testified: "Just prior—about a hundred feet before the car went over the embankment—all of this road was gravelled road —there were a pile of gravel on the righthand side traveling toward West Union, south, about 12 feet long and about six or seven or eight inches deep. Gravel had been dumped there on the traction of the road on the righthand side." Mrs. Schmidt visited the scene of the accident on the day following its occurrence and corroborated the testimony given by Corporal and Mrs. Knight. The testimony of claimant herself was not enlightening, but was to the same substantial effect of that given by the other witnesses. The car skidded for one hundred feet from the point where claimant's mother said it struck the pile of gravel before going over the embankment. Both ladies were rendered unconscious. Neither Corporal Knight nor Mrs. Schmidt saw the accident occur. When a gentleman from West Union went to the scene of the accident to transport claimant and her mother to West Union neither told him anything about having run into a pile of gravel.

The evidence offered by the road commission in opposition to the claim makes it plain to the court that the accident could not have occurred for the reason and under the circumstances relied upon by claimant. All of this evidence is positive, direct and persuasive. F. R. Amos, maintenance superintendent of roads in Tyler county, and so employed for seven years, and familiar with state route 18 in Tyler county, said that no accident of claimant had been reported to him and that if an obstruction had existed on the highway it would have been reported to his department, which was never done. He said

that no gravel was placed upon state route 18 in July, 1940, and that if any gravel had been placed upon the road he would have known about it. He said there was never heavy traffic on that road.

Harvey Graham, maintenance foreman for the road commission in Tyler county, who has been employed on the highway in question for twenty-one years, Russell Ashe, foreman and truck driver for the road commission, John W. Headley, employee of the road commission, and Roy Rhodes, a former truck driver, testified in such particularity as to make it obvious to the court that the road on which the accident occurred was in good condition for public travel and that no pile of gravel was on the road in the month of July, 1940, at the point where it is contended by claimant that there was a pile of gravel. No good purpose will be served by detailing the testimony of these several witnesses. It is sufficient to say that the claimant has failed to establish the merit of her claim as one for which the Legislature should make an appropriation.

We repeat what we have heretofore said that the state does not guarantee the safety or freedom from accidents of persons using its public highways.

It is unfortunate that the accident in question should have occurred, but we are unable to find anything in the record that would warrant an award in favor of claimant. An award will therefore, be denied and the claim dismissed.

(No. 420-S—Claimant awarded $312.00)

JACOB F. BENNETT, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 11, 1945

Appearances: The claimant in his own behalf:

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimant, Jacob F. Bennett, was permanently injured by a dynamite explosion on March 20, 1934, while working for the state road commission in Nicholas county, West Virginia, and this court at its January term, 1943, in an opinion rendered by The Honorable Walter M. Elswick, one of the judges of the said court, held that claimant had been injured through no fault of his and without any negligence whatever on his part, and was therefore entitled to an award. Accordingly, as shown by the records of this court, an award of $1,248.00 was made for the biennium 1943-1945, payable at the rate of $52.00 per month.

The Legislature had on previous occasions made appropriations to pay the claim of said claimant for a period from June 30, 1935 to 1941.

The state road commission was not a subscriber to the workmen's compensation fund at the time claimant was injured. It has been the apparent policy of the Legislature to award compensation to claimant in the nature of payments similar to those payable by the workmen's compensation commission. The claimant in this case has expressed his desire to receive compensation in this manner rather than to receive a lump-sum award. His reason for this is prompted by his inability to attend to

any business affairs due to deranged mental condition caused by the explosion.

By reason of the specification that the amount was to be paid claimant at the rate of $52.00 per month, beginning January 1, 1943, but specifying further that it was for the "Biennium" which did not begin until July 1, 1943, there was a period of six months for which no payments were made to claimant. The road commission now recommends that the sum of $312.00 be paid to claimant to compensate him for the six months period, viz: from January 1, 1943 to July 1, 1943, not covered by the award of February 10, 1943, *in re* claim No. 223, 1 Ct. Claims (W. Va.) 108, and the said recommendation is concurred in by the office of the attorney general of the state of West Virginia.

In view of the evidence heretofore submitted, and the decision heretofore referrd to and renderd by this court, as well as the expressed desire of claimant to have compensation paid in monthly instalments, we recommend an award of three hundred and twelve dollars ($312.00) for the said period from January 1, 1943 to July 1, 1943, during which no payments had been made and during which time, to such payments, as shown by the evidence heretofore taken and the recommendation of the state road commission, concurred in by the attorney general's office, claimant was entitled.

An award of three hundred and twelve dollars ($312.00) is accordingly made.

(No. 421-S—Claimant awarded $936.00)

JACOB F. BENNETT, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 11, 1945

CHARLES J. SCHUCK, JUDGE.

As heretofore indicated in an award made at the present term, as well as an award made by this court to claimant on February 10, 1943, to which reference has been made in claim No. 420-S, and for the reasons appearing in said opinion, heretofore filed in claim No. 223, 1 Court of Claims (W. Va.) 108, claimant filed his claim herewith for $936.00, payable at the rate of $52.00 per month, beginning July 1, 1945 and continuing to December 31, 1946; this claim being in effect a continuation of the award made February 10, 1943, in case No. 223, *supra*.

The state road commission, through its officials, recommends the continuation of the payment for the period indicated, at the rate of $52.00 per month and the attorney general, through the assistant attorney general, W. Bryan Spillers, concurs in the said recommendation.

In view of the action heretofore taken by the Legislature in honoring and allowing said monthly payment for the periods indicated, we make a further award of nine hundred and thirty-six dollars ($936.00) for the period from July 1, 1945, to December 31, 1946, payable to claimant at the rate of $52.00 per month.

(No. 428-S—Claimant awarded $15.00)

R. C. ATKINS, Claimant

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 11, 1945

CHARLES J. SCHUCK, JUDGE.

On September 6, 1944, while driving along route No. 25, near Dunbar, West Virginia, claimant was obliged to drive off the road onto the berm thereof to allow another car to pass, and in so doing the rear right tire of his car was cut by a piece of road sign or peg left sticking out of the ground by the employees of the road commission who had removed the sign proper but had failed to take out and remove the iron peg which seemingly was sharp enough to cut and ruin the tire of the claimant while on the berm of the road as aforesaid.

The claim is in the amount of $15.00, and settlement of the said amount is agreed to by the road commission and approved by the attorney general's office through the assistant attorney general.

An award in the sum of fifteen dollars ($15.00) is therefore made in favor of claimant and we recommend payment accordingly.

(No. 425-S—Claimant awarded $50.00)

B. PREISER COMPANY, Inc., Claimant,

v.

BOARD OF CONTROL, Respondent.

Opinion filed January 11, 1945

CHARLES J. SCHUCK, JUDGE.

Claimant presents its claim in the amount of $50.00 for transportation charges occasioned by making a shipment of certain equipment from Charleston to Huntington, West Virginia, and the return of same to Charleston upon rejection of the equipment at Huntington.

From the record it seems that the equipment was intended for Marshall College and for some reason, not apparent, the authorities at Huntington repudiated the contract or order theretofore entered into or given through the board of control, and claimant was obliged to pay freight charges to Huntington and return on the equipment in question. The board of control, through its officers, in a communication sent to this court, stated substantially that the claim should be paid and that the board of control feels that it is a just claim and that compensation should be made accordingly to the company claimant. The position of the board of control in the matter is affirmed by the office of the attorney general through its assistant, in the approval that is likewise submitted with the communication of the board of control. Under the circumstances and the facts presented to us we therefore make a recommendation that the sum of fifty dollars ($50.00) be paid in full settlement of the claim and recommend to the Legislature that the appropriation be made in accordance with the said findings.

(No. 442-S—Claimant awarded $39.99)

I. FRANK HALLER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 12, 1945

CHARLES J. SCHUCK, JUDGE.

On December 4, 1944, claimant, while driving his automobile on U. S. highway 19, in Harrison county, West Virginia, at 7:30 A. M. on the date in question, and while the weather was foggy, had a collision with a state road truck operated by an employee of the state road commission.

From the record and facts submitted it seems that the state road truck in question was attempting to enter upon said highway and had pulled on the highway with the front bumper of said truck extending over and upon the highway for a distance of about six feet. Claimant was traveling north on the highway at the time of the said collision. The investigation, as conducted by the safety director for that particular district, shows that the driver of the state truck was at fault, and that by reason of the said negligence the accident in question occurred. No negligence is imputed to claimant. The damages to claimant's car amounted to $39.99.

The state road commission recommends payment of the aforesaid amount in full settlement for all damages incurred by the claimant by reason of the accident, and the claim is approved for payment by the assistant attorney general. We therefore make an award in the sum of thirty-nine dollars and ninety-nine cents ($39.99) and recommend that payment be made accordingly in the said amount.

(No. 429-S—Claimant awarded $72.00)

DORIS C. BOWMAN, *Acting for her daughter,* Mary Margaret Gilbert, infant, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 12, 1945

CHARLES J. SCHUCK, JUDGE.

The facts as submitted in this claim show that on October 15, 1944, Mary Margaret Gilbert, age twelve years, while running across the Third avenue bridge on state route No. 2 in the city of Huntington, West Virginia, stepped on a board which broke, causing the said infant's leg to go down through the sidewalk and injuring her in such a way as to require medical attention. She was treated by Dr. J. S. Hayman and Dr. Cole D. Genge, of Huntington, and an X-Ray was taken and according to the report of the state road investigation there were no permanent injuries. The medical bills amounted to $22.00 for both physicians. The mother of claimant has agreed to settlement in the sum of $50.00 plus the $22.00 for medical services in full for all damages that may have been suffered by said infant and incurred by reason of the said occurrence. The state road commission recommends the payment of the amount in question, to wit: $72.00, and this conclusion is concurred in and approved by the attorney general's office through the assistant attorney general.

We approve the claim as one that should be paid, but desire to call attention to the fact that as the real claimant is an infant, a guardian should be appointed by the county court of Cabell county, who would be empowered to receive the amount involved and give to the state road commission a proper and sufficient receipt. An award of seventy-two dollars ($72.00) accordingly is made.

(No. 430-S—Claimant awarded $40.80)

J. E. NEFF, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 12, 1945

CHARLES J. SCHUCK, JUDGE.

Claimant filed his claim in the sum of $40.80 for damages alleged to have been caused to his truck by being struck by state road commission truck No. 730-76.

The accident occurred on state route No. 5, in Trubota, Gilmer county, West Virginia, on July 19, 1944.

From the record as submitted for our consideration it appears that the state road truck, preceding or ahead of claimant's truck, stopped suddenly without any warning whatever to claimant, or without any hand signal being used by the operator of the state road truck, causing a collision between the two trucks and bringing about the damages in question.

Claimant originally presented a claim for $75.00, but has agreed to accept the amount of $40.80 in full settlement of all damages occasioned by the accident referred to.

Payment of the claim is recommended by the state road commission and approved by the attorney general's office through the assistant attorney general, and we, therefore. recommend an award of forty dollars and eighty cents ($40.80) to claimant in full settlement of all damages occasioned by the said collision.

(No. 431-S—Claimant awarded $179.93)

A. R. HOLBERT, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 15, 1945

G. H. A. KUNST, JUDGE.

In October, 1944, claimant's Chevrolet truck loaded with logs, broke through Stockton Run No. 35-8 bridge, in Calhoun county, West Virginia, and fell into the creek. The bridge was unsafe by reason of a rotten sill, and no notice of capacity of bridge or warning signs were posted.

The cost of repairing the damage so occasioned amounted to $179.93, for which claim is made. Respondent recommends and the attorney general approves its payment.

An award of one hundred and seventy-nine dollars and ninety-three cents ($179.93) is made to claimant.

(No. 427-S—Claimant awarded $15.00)

GENE COONTS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 15, 1945

ROBERT L. BLAND, JUDGE.

While state road commission truck No. 730-72, operated by one Lee Cross, on a state road in Barbour county, on June 1, 1944, was making a right turn at the road intersection, its

right rear wheel caught the right rear fender of a 1941 Buick automobile owned by claimant, then lawfully traveling upon the highway. Investigation of the accident discloses that claimant's vehicle had been damaged to the extent of $15.00, which amount was found to be necessary to pay for costs of repair. Claimant filed his claim with the road commission for that amount. The head of that agency, deeming the claim to be meritorious, concurred in its payment, and made and filed a record thereof with the clerk of this court on December 8, 1944. An assistant attorney general approved the claim as one for which an appropriation should be made by the Legislature. We are of the same opinion.

An award is therefore made in favor of claimant, Gene Coonts, for fifteen dollars ($15.00).

(No. 435-S—Claimant awarded $50.00)

J. F. MEANS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 15, 1945

G. H. A. KUNST, JUDGE.

On November 13, 1944, the driver of state road truck No. 330-55, at East Street Bridge, route 21, in Parkersburg, West Virginia, under the jurisdiction of respondent, to avoid a streetcar pulled off its track. Because of the heavy frost on the steel plate of the bridge the truck skidded and struck claimant's automobile, causing damage to the car, the cost of repairing which amounted to $84.77.

Respondent recommends and the attorney general approves an award of fifty dollars ($50.00), which is made to claimant.

(No. 438-S—Claimant awarded $34.82)

ROY JARRELL, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 15, 1945

ROBERT L. BLAND, JUDGE.

On September 23, 1944, claimant Roy Jarrell, of Point Lick, West Virginia, was driving his automobile on the state highway on Campbells creek, near Tad, in Kanawha county, West Virginia. A state road commission shovel was engaged in work on the road. An employee of respondent, acting in the capacity of flagman, permitted claimant to pass by the shovel. The shovel was so operated that it struck claimant's automobile and caused such damage thereto that he was obliged to pay the sum of $34.82 to have necessary repairs made thereto. For this amount claimant filed a claim with the road commission for reimbursement. The head of the agency concerned concurred in the claim, made and filed a record thereof with the clerk of this court on December 15, 1944. An assistant attorney general, having examined the record, approves the claim as one for which payment should be made by the state.

Under the facts appearing in the record we are of opinion that the claim is meritorious and that an award should be made therefor.

An award is, therefore, made in favor of claimant, Roy Jarrell, for thirty-four dollars and eighty-two cents ($34.82).

(No. 440-S—Claimant awarded $161.26)

R. O. ROBERTSON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 15, 1945

ROBERT L. BLAND, JUDGE.

The claim filed in this case is for repairs made to a damaged automobile.

On November 30, 1944, Emily P. Robertson, wife of claimant, R. O. Robertson, of 222 Holswade Drive, Huntington, West Virginia, was driving an automobile owned by her husband, bearing West Virginia license No. 8790, in the city of Huntington, West Virginia and was traveling south on Tenth street. The street was slippery and wet. Mrs. Robertson had the right of way. State road commission truck No. 229-19 failed to stop at the stop sign, as a result of which it collided with claimant's car and caused serious damage thereto. An investigation made by the road commission shows that the state-operated vehicle was at fault and responsible for the accident. An itemized estimate of the necessary costs of repairs to claimant's car fixes the amount at $161.26. The head of the department concerned concurs in the claim filed for that amount. An assistant attorney general, whose duty it is to familiarize himself with the record, has approved the claim as one which, within the meaning of the court act, should be paid by the state.

An award is now made in favor of claimant, R. O. Robertson, for one hundred and sixty-one dollars and twenty-six cents ($161.26).

(No. 374—Claim denied)

R. G. YOAK, Claimant

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 15, 1945

An award will be refused, where reasonable care has not been exercised by a claimant in driving an automobile over an uneven rock stratum in the road, causing an accident, in which claimant is injured and for which an award is asked against respondent.

Appearances:

J. Worley Powell, for claimant:

W. Bryan Spillers, Assistant Attorney General for the state.

G. H. A. KUNST, JUDGE.

Claimant, R. G. Yoak, a Methodist Minister at about 7:30 o'clock, P. M. on the 30th day of October, 1942, started to drive in a Ford coupe from his home in Farmington, Marion county, West Virginia, to hold services at Bethel Methodist Church in said county. When at a point about one-half a mile distant from the church, his car left the road, overturned and rolled down a steep embankment on the left side of the road, as a result of which he was severely injured, which he alleges was caused by respondent's negligence in permitting an uneven rock stratum forming part of the road bed to remain as an obstruction in the road, causing this accident and for which alleged negligence, claimant asks an award against respondent for the sum of $7,070.00.

This secondary road in Lincoln district of said county of Marion is called the Dunkard Mill Creek Road and is under the jurisdiction of respondent.

At the place where the accident occurred the road was from twelve to fifteen feet in width, the stratum of uneven rock ex-

tended over half the distance from the upper right side of the road across it, but not leaving sufficient space between the rock formation and the embankment on the left for a car to pass. The preponderance of evidence of a number of witnesses, thoroughly familiar with the uneven surface of this place in the road, from constantly driving over it, was that with reasonable care in driving no serious danger or unusual hazard resulted from this condition and that had claimant exercised such care the accident would not have occurred. A careful examination of this place made by the court confirmed this conclusion. An award is refused and the case dismissed.

(No. 311—Claim denied)

R. J. THRIFT, Jr., Claimant,

v.

EDGAR B. SIMS, State Auditor and ex officio Commissioner of Forfeited and Delinquent Lands, Respondent.

Opinion filed January 16, 1945

Compensation for duties performed and services rendered by a deputy commissioner of forfeited and delinquent lands is payable out of the operating fund for the land department in the auditor's office; and the Court of Claims will not recommend to the Legislature an appropriation for such compensation when a claimant fails to allege and prove that compensation for such services claimed by him and to which he might show himself to be justly entitled is not available in the said fund for the satisfaction of his claim.

Arnold M. Vickers, for claimant;

Ira J. Partlow, Attorney General, *Eston B. Stephenson,* and *W. Bryan Spillers,* Assistant Attorneys General, for respondent.

ROBERT L. BLAND, JUDGE.

On the 13th day of October, 1942, by authority of chapter 117 of the Acts of the Legislature of the state of West Virginia,

1941, regular session, claimant R. J. Thrift, Jr., was duly appointed a deputy commissioner of forfeited and delinquent lands for Fayette county, West Virginia, by Edgar B. Sims, the state auditor, as *ex officio* commissioner of forfeited and delinquent lands of West Virginia. He maintains that as such deputy commissioner he made and completed "basic" abstracts of title on six hundred and sixty-two separate and distinct tracts and parcels of property, of which number thirty-two tracts were abstracted completely. Pursuant to his appointment as such commissioner claimant applied to the circuit court of Fayette county, West Virginia, on November 2, 1942, for an order fixing the date of sale and the date of first publication of the list and notice of sale as was provided by said act, and on that date secured the entry of an order of said court setting the date of sale for January 25, 1943, and the date of first publication for November 12, 1942. Prior to the sale ninety-four tracts were redeemed from the deputy commissioner and two tracts were suspended from sale, leaving a total of seven hundred and forty-seven tracts which claimant offered for sale on January 25 and 26, 1943. Of this total number seventy-five tracts were sold to individuals and six hundred and seventy-two tracts were sold to the public land corporation of West Virginia. Ten of these tracts sold to the public land corporation were redeemed by the owners before any abstracts thereof were made by the deputy commissioner.

Claimant says that he performed said work in good faith and under authority of the statute of West Virginia in effect at that time. He maintains that said statute provided in effect that he should be paid $5.00 for each abstract completed, which would entitle him to the sum of $160.00 for the thirty-two abstracts completed, and that in addition to those completed he made "basic" abstracts on six hundred and sixty-two additional tracts of property in complete good faith and under authority of the statutes of West Virginia in effect at that time, and that for such work he should be entitled to a minimum of one-half of the fee allowed for completed abstracts, which would entitle him to an additional fee of $1575.00, which together with the

said $160.00 would entitle him to the gross payment of $1735.00 for work and labor performed. Claimant contends that all of this work was done and completed about one week prior to March 26, 1943, on which date the Supreme Court of the state of West Virginia held the act above mentioned and under which he performed his services to be unconstitutional. He says that he has been paid nothing, directly or indirectly, for his said services. He asks that his claim for the sum of $1735.00 for work and labor done as deputy commissioner of forfeited and delinquent lands of Fayette county, prior to March 19, 1943, be allowed, approved and confirmed and that the same be recommended to the Legislature for appropriation and approval.

The attorney general has moved to dismiss the claim on the following grounds:

> "*(1.)* That the facts and allegations of Claimant's petition do not state a valid cause of action on a claim sufficient in law against respondent or the state within the meaning of chapter 20, Acts of the Legislature, 1941, known as the State Court of Claims law;
>
> "*(2.)* No liability exists against the state since claimant is not entitled to compensation for services rendered under an unconstitutional statute."

In the case of *Sims, Auditor, et al* v. *Fisher, Judge,* decided March 26, 1943, reported in 25 S. E. 2nd series, page 216, 125 W. Va. 512, the Supreme Court of Appeals of West Virginia determined that the provisions of the statute under which claimant contends that he performed services " . . . with reference to the creation of the office of commissioner of forfeited and delinquent lands, and his deputies in the several counties of the State, and for the certification of delinquent and forfeited lands to the circuit courts of the counties, and which provide the method by which lands may be redeemed from the deputy commissioners, are valid exercises of legislative powers . . . "

but held " . . . the act unconstitutional, first, so far as it fails to provide for a judicial ascertainment, prior to any order of sale, that lands proceeded against are, in fact, subject to sale; and, second, because as the act now stands it attempts to impose upon circuit courts administrative powers, in connection with such sales, in violation of the several constitutional provisions . . . " partcularly referred to in the opinion.

Section 33, article 4, chapter 117, enacted by the Legislature of 1941, reads as follows:

> "Immediately after the sale the deputy commissioner shall, as to each sale of forfeited or delinquent land to the public land corporation, proceed with the examination of title and with preparation of the list of persons to be served with notice to redeem. Before the sale may be confirmed, he must complete the list and apply to the circuit court or judge for an order directing the clerk to prepare and serve the notice as provided in sections thirty-seven and thirty-eight of this article. *For such services* in respect to each sale, the deputy commissioner shall be entitled to a fee of five dollars, plus such additional compensation as the auditor may recommend and the court or judge approve, to be paid out of the operating fund for the land department in the auditor's office." (Italics ours.)

This statute makes no express provision for the payment of compensation for "basic" abstracts. It does not expressly provide for the payment of a fee of five dollars for a completed abstract and other services to be performed. It is true that it does provide that for all of the services therein directed to be performd by a deputy commissioner of forfeited and delinquent lands he shall be entitled to a fee of five dollars and such additional compensation as the auditor may recommend and the court or judge approve. It is not contended by claimant that he did more than make basic abstracts on 662 tracts of land and complete abstracts on 32 parcels of that number. Claimant maintains that he was engaged approximpately two months in performing the services and doing the work for which he claims

in this case an award should be made in his favor of $1735.00. He says that none of his abstracts or data have been furnished to the auditor as *ex officio* commissioner of forfeited and delinquent lands. When asked, "Was this data turned over to the auditor?" claimant replied, "No, sir, and it won't be until I get paid for it. Until I am paid for it it is my own personal property." When asked if he had been paid any fees or commissions as deputy commissioner, he answered, "I have, but not for this particular work." We presume that he had reference to the sum of one dollar paid to him for every tract certified to the circuit court of the county of his appointment, as provided by section 5, article 4, of the statute. Since 747 tracts were offered for sale, 2 suspended from sale and 94 redeemed, making a total of 843, it is assumed that claimant has already been paid that much money, even though he may not have been paid any additional compensation for the partial work done by him under section 33 of article 4, chapter 117.

We have no hesitation in expressing the opinion that there can be no valid cause of action against the state. There may however, be meritorious claims prosecuted for which appropriations should properly be made against the state as a sovereign commonwealth. We are not prepared to concede that a claim against the state is synonymous with a cause of action. There is much authority to sustain the proposition that no liability exists for services performed under an unconstitutional statute. 43 Am. Jur. section 341, at page 135. We deem it unnecessary to make further citation. We are of opinion, however, that under circumstances where services have been rendered in good faith under a statute subsequently declared to be unconstitutional compensation could properly be made.

We have examined what are called "basic abstracts" in this case as well as an original completed abstract. In view of the determination which we have concluded to make of this claim we deem it unnecessary to discuss whether or not these abstracts, basic and complete, are of any or such value to the state or to the public land corporation as would warrant and justify this

court in making a recommendation to the Legislature for an appropriation such as that prayed for in claimant's petition. In our judgment compensation for duties performed and services rendered by a deputy commissioner of forfeited and delinquent lands is payable out of the operating fund for the land department in the auditor's office. Section 33, article 4, chapter 117, Acts of the Legislature of West Virginia, 1941.

An award is denied and the claim dismissed.

CHARLES J. SCHUCK, JUDGE, dissenting.

The majority opinion reviews in detail the facts upon which this claim is based; the act under which claimant was employed by the auditor to do the abstracting in question, and a review of the decision by our Supreme Court declaring the act unconstitutional, the said court's decision having been rendered shortly after the claimant had performed and finished his services.

The attorney general moved to dismiss the claim upon the grounds:

> "*1.* That the facts and allegations of claimant's petition do not state a valid cause of action on a claim sufficient in law against respondent or the state within the meaning of chapter 20, Acts of the Legislature, 1941, known as the State Court of Claims law;
>
> "*2.* No liability exists against the state since claimant is not entitled to compensation for services rendered under an unconstitutional statute."

Without entering upon a discussion of the law applicable to the proposition, whether or not a legal or so-called valid cause of action is presented, I feel that claimant is entitled to at least reasonable compensation for the services rendered. He was retained by the auditor to do the work. He rendered his services in good faith; a fact evidently admitted, at least indirectly, in the majority opinion as shown therein, where the opinion recites: "We are of opinion, however, that under circum-

stances where services have been rendered in good faith under a statute subsequently declared to be unconstitutional compensation could properly be made."

He discharged his obligation to the state in full before the rendering of the Supreme Court's decision, and to deny him compensation for his services is in my opinion unjust and unwarranted, especially so, when technicalities must be resorted to in order to deny his claim. There was, at the very least, a moral obligation on the part of the state to pay, and if the clause "equity and good conscience" in the act creating the Court of Claims mean anything, then, in my opinion, this is a claim which ought to be paid. The fact that the act under which he rendered the services was declared unconstitutional cannot control since many courts hold that liability does exist for services rendered under an act which is afterward declared unconstitutional. In fact I firmly believe that the majority of the courts so hold. If this were not true then we can readily contemplate that many state officers and employees could, at some time or other, he denied pay of salaries, in whole or in part, because they had worked or rendered services under an act later declared unconstitutional. It is obvious that to deny them pay under such circumstances would be a gross injustice and an irreparable wrong.

I repeat, the claimant acted in good faith; he rendered the desired services for which the auditor had retained him; the services may yet be beneficial to the state at some future time; equity and good conscience are beyond question on the claimant's side, and demand that he be paid.

I would therefore favor an award.

(Nos. 324, 325, 326, 327—Claims denied.)

JOSEPH HARVEY LONG, PAUL WALKER LONG, JENNY ELOISE LONG and HILDA S. LONG, Claimants,

v.

STATE TAX COMMISSIONER, Respondent

Opinion filed January 16, 1945

The Court of Claims is without jurisdiction to extend the time fixed by statute to make application for refund of excess income tax paid. Such income taxpayer is obliged to avail himself of the remedy provided by law for relief.

Appearances:

Scott & Ducker (H. L. Ducker) for claimants:

Ira J. Partlow, Acting Attorney General, *Eston B. Stephenson*, and *W. Bryan Spillers*, Assistant Attorneys General for respondent.

ROBERT L. BLAND, JUDGE.

Claimants, residents and taxpayers of the city of Huntingston, Cabell county, West Virginia, made and filed with the state tax commissioner of the state of West Virginia, on March 15, 1938, regular income tax returns and paid taxes to the state for the year of 1937, in accordance with the law in such case made and provided. After making and filing these returns and the payment of taxes thereon they discovered that by reason of their failure to take into consideration, in determining the amount of their respective incomes for the year 1937, the fair market value of the stock of the Charleston Broadcasting Company, a West Virginia corporation, as of January 1, 1935, which said company was being liquidated in the years 1936 and 1937, they paid to the state the following sums in excess of the amounts which they were obligated to pay to the state as income taxes for said year 1937:

Joseph Harvey Long, $617.31.

Paul Walker, Long, $308.65.
Jenny Eloise Long, $308.65.
Hilda S. Long, $308.65.

Subsequent to two years after filing by claimants of their said income tax returns for the year 1937, but within three years from the time they so filed their 1937 income tax returns, they respectively filed with the state tax commissioner requests for and claims of refunds in the said excess sums so paid by them respectively, with interest from the date of said payments, which requests and claims were refused and denied by the state tax commissioner for the reason that under the regulations promulgated by the state tax commissioner the said requests and claims were not presented or made within two years from the date of the filing by claimants of their income tax returns for the year 1937 and because the hereinafter specified three year limitation upon so doing was not applicable to such requests or claims of refund.

Claimants direct the court's attention to chapter 128 of the Acts of the Legislature, regular session, 1939, amending and reenacting article 13-a of chapter 11 of the code of West Virginia of 1931, which provides as follows:

> "Sec. 54. Refunds. A taxpayer who has paid in any manner, except under the provisions of subsection three or four of section fifty-three, an amount of tax for any taxable period in excess of the amount legally due for such period, may file with the commissioner a claim for refund of such excess.
>
> "Unless a claim for refund is filed by the taxpayer within three years from the time the tax was due or within two years from the time the tax was paid, whichever shall be the later date, no refund shall be allowed.
>
> "The amount of the refund shall not exceed the portion of the tax paid during the three years immediately preceeding the filing of the claim, or, if no claim was filed, then during the three years immediately preceeding the allowance of the refund. A refund under this section shall be with interest at

> six per cent from time of payment. Interest payments on refunds heretofore made under this article are hereby authorized and approved.";

and to the regulations relating to the West Virginia Personal Income Tax Act, promulgated by the state tax commissioner, which includes the original income tax act of 1935, as amended by the Acts of the Legislature of 1937 and as further amended by the Acts of the Legislature of 1939, which contains, in section 54 thereof, page 155, the same provisions as are above set forth, with section 61 of said regulations of the state tax commissioner reading as follows:

> "Sec. 61. This article shall take effect as of January first, one thousand nine hundred thirty-five, and the first tax to be assessed under this article shall be computed upon income received during the calendar year one thousand nine hundred thirty-five."

Claimants say that relying upon the provisions of section 61 as set forth in the regulations of the state tax commissioner they were informed and believed that they could make such requests for and claim of refund of the said overpayments of taxes for 1937, in the said sums of $617.31, $308.65, $308.65, and $308.65, within a period of three years after the date of the filing of their respective income tax returns for the year 1937 on or before March 15, 1938, that is, that they could make such requests or claims for refunds at any time prior to March 15, 1941, and that they did so make such requests and claims for refund within that time, and that although it may be true that they have no strictly legal right to have refunds on account of the said provisions of the said regulations of the state tax commissioner, yet they contended that they relied upon the information furnished by the state tax commissioner in his said pamphlet of regulations as to the law and to the regulations relating thereto and as to the time within which they could apply for such refund, and consequently they have been unduly and unfairly prejudiced and damaged on that account in the premises, and have suffered the loss of the amount of refund claimed, with interest thereon, which loss and damages they maintain they should not in equity and in fairness suffer.

In this proceeding claimants seek awards for said alleged overpayments, with interest thereon from March 15, 1938.

Respondent admits the filing of 1937 income tax returns and the payment of taxes thereon on March 15, 1938 by claimants, but has moved to dismiss all four of the claims. Respondent contends that under the law applicable (section 53, article 13-a, chapter 11 of the code as amended by chapter 89, Acts of the Legislature of 1935) claimants were required to make application to the commissioner for revision of the taxes assessed against them at any time within one year from the filing of the returns, whereupon the tax commissioner would be required by statute to refund to the taxpayers the amount, if any, paid in excess of the tax found by him to be due; and that likewise any refund under the provisions of the general appropriation of chapter 1, Acts of the Legislature, 1937, title 2, section 8 expired as of June 30, 1939, the end of the second fiscal year (chapter 1, title 1, section 2, Acts of the Legislature, 1937). It is maintained that the claims for refunds for everpayment expired and were barred by the statute of limitations at least eight months prior to the circulation of the regulation containing the alleged misrepresentation as complained of by the claimants, which regulations were not given public circulation until at least February 15, 1940, and that therefore no injury or prejudice to the rights of claimants could have occurred from any alleged misrepresentation occurring after the claimants were legally barred from filing applications for income tax refunds for overpayment of taxes.

Respondent further defends the four several claims on the theory that claimants had an adequate remedy under section 53, article 13-a, chapter 11 of the code as amended, chapter 89, Acts of the Legislature, 1935, whereby they could have paid the tax under protest and then made application to the tax commissioner for refunds of the amounts paid within one year from the filing of the return, and if refused refunds they could have brought mandamus proceedings in the circuit court of Kanawha county against the tax commissioner asking that the

correct amount of their tax liability be extended and that any excess paid by them beyond the proper charge be refunded as authorized by the decisions of the Supreme Court of Appeals of West Virginia in *Dickinson* v. *James*, 120 W. Va. 222. It is argued that claimants had an adequate remedy within the meaning of subsection 7, section 14, article 2, chapter 14 of the code providing that the jurisdiction of the State Court of Claims shall not extend to any claim with respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state.

Upon careful consideration of the record we conclude that claimants could not have been misled by anything contained or appearing in the regulations promulgated by the tax commissioner. Their failure to make application for refunds within the time prescribed by statute to do so was doubtless the result of misapprehension or inadvertence on the part of the person charged by claimants with the responsibility and duty of making application for refunds on their behalf. The evidence offered by claimants upon the hearing in support of their claims seems to us to warrant this conclusion.

Claimants admit that they have no strictly legal right to refunds but argue that in equity and good conscience awards should be made in their favor. This court has no power to extend the time for making application for refund of taxes paid beyond that fixed by statute. Under the facts disclosed by the record we are unable to perceive that claimants are entitled to redress against the state, either at law or in equity.

Claimants had a remedy afforded them by statute. By pursuing that remedy and making application for refunds of excess income taxes paid by them within the period fixed by law to do so it would have been the duty of the tax commissioner to make such refunds to them as they might have shown themselves to be entitled to receive. This court must deal with the statute as it finds it. We have no power to afford claimants relief in the premises.

An award is denied in each case.

(No. 378—Claimant awarded $865.00 upon rehearing)

ELMA SHEPHERD, Claimant,

v.

DEPARTMENT OF PUBLIC ASSISTANCE, Respondent.

Opinion filed January 17, 1945
Opinion on rehearing filed December 17, 1945

An employee of the department of public assistance engaged in the work of investigating applications for relief and commonly termed a "visitor" and whose position and salary are based upon seniority and service ratings and who is one upon the preferred eligible list when appropriations for the said department are curtailed or decreased, cannot be dismissed without just cause and if so dismissed without such just cause is entitled to her salary during the period of such dismissal.

Appearances:

W. S. Pettigrew, and *R. K. Talbott,* for the claimant;

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

The claimant, Elma Shepherd of Huntington, West Virginia was heretofore an employee of the Cabell county council of the department of public assistance and was so employed for a long period prior to the 27th day of June, 1943. She was known as a "visitor" and had accumulated 15 and 9/12 points based on seniority and service ratings. On the first day of July, 1943, seemingly with no reason assigned therefor, she was dismissed from the said service and on the 31st day of October, 1943, she was formally notified of her dismissal with the following charges preferred to wit:

> "Inefficiency, does not cooperate with other workers of the department; unsatisfactory in attitude toward clients."

Subsequently, claimant appealed said dismissal to the merit system council of the state of West Virginia and the charges preferred as aforesaid not having been substantiated she was on the first day of March, 1944, reinstated and has been since said time performing her duties as a "visitor" for the Cabell county council of the department of public assistance. She presents her claim in the amount of $1020.00 less a credit of $95.00 in the nature of vacation pay, claiming a net amount of $925.00 for her illegal dismissal during the period from July 1, 1943, to March 1, 1944; six months of said period being calculated at the rate of $120.00 per month and two months at the rate of $130.00, and $40.00 for four months increase in salary at $10.00 per month involving the period from March 1, 1944, to July 1, 1944. So far as the salary claimed is concerned, the amount thereof, if due and payable, seems to be correct.

In performing her services as such "visitor" claimant was governed by the rules and regulations of the West Virginia merit system by virtue of which certain ratings are given based upon the efficiency of the employee, term of service and other qualifications fixed and defined by the department having charge of the said public assistance department. The employees in the said department are practically under civil service and while governed and controlled by certain regulations and requirements, are likewise protected in their employment and cannot be dismissed after a certain time without just cause.

By reason of the reduction in the appropriation for public assistance in the year 1943, it became necessary for the agency in charge to reduce its staff. The West Virginia merit system rule provides for a special way of reducing a force where it is necessary because of lack of funds. The rule provides that reduction of the force shall be made on the basis of the formula promulgated by the merit system supervisor and which takes into consideration the service ratings and seniority so far as employment by the agency is concerned. Such formula was submitted to the council or agency of Cabell county; was fully

agreed to and the "layoff" or reduction of employees was to be made by all the dependent agencies in accordance with the rule so promulgated. The department of public assistance at the time the emergency arose sent to the different county agencies in the state the formula showing how the different county forces were to be reduced and listed as well the names of the persons who were eligible and how many should be retained in each county together with the stipulation that the persons at the top of the list were to be retained and indicating the number of said persons so to be retained.

In the case of Cabell county where claimant was employed, there were eighteen names submitted to the agency of that county, together with the instructions that the first seven persons so named were to be retained. Claimant was among the first seven and according to the instructions given from the department at Charleston ought to have been retained. However, the local agency of Cabell county seemingly refused to comply with the formula as promulgated by the state department and shortly thereafter following a conference with the state agency officials preferred charges against claimant alleging inefficiency, failure to cooperate and unsatisfactory attitude toward clients. From this dismissal so made, claimant appealed to the state agency at Charleston and after a hearing, was fully vindicated and the appeal upheld by the state council. The agency of Cabell county in changing the "layoff" to dismissal acknowledged that it had improperly and irregularly dismissed claimant from her employment. Claimant was fully reinstated and has continued to work in the department since that time. She was "laid off" from July 1, 1943, to March 1, 1944, or a period of eight months, during which time she received no compensation so far as the record reveals.

In view of the nature of the employment in which claimant was engaged, the rules and regulations governing her employment, the fact that she was virtually under civil service and could only be dismissed for just cause; and the further fact that the actions of the local agency of Cabell county in dismissing

claimant being wholly unwarranted and improper impels us to conclude that if the rules and regulations as promulgated by the state department mean anything at all, then claimant is entitled to her salary for the period during which she was laid off by reason of the improper and illegal action of the Cabell county agency.

The particular state agency involved is one of great importance to the welfare of the state, taking care of citizens who by reason of old age, physical incapaciy or ailments, or for other reasons, are entitled to help and assistance from the state. The very nature of the work required of employees in this department makes special fitness so far as ability and personality are concerned the very essentials necessary to successfully carry on the work of the department; and it seems to us that the establishment of the merit system which in effect in this particular department means civil service, would bring about a higher and greater degree of efficiency and ability in the discharge of the duties and obligations of the employees of that department. It was therefore, right and proper that employees in the department known as "visitors" should be protected and continued so long as their services were satisfactory and beneficial, not only to the department and the state, but to clients as well. The department of Cabell county having acted without authority or justification and the claimant not having been guilty of inefficiency or any lack of cooperation as alleged by that agency, is under the rules and regulations of the West Virginia merit system as promulgated, entitled to her salary. We therefore, make an award to the claimant in the sum of nine hundred and twenty-five dollars ($925.00) and recommend that it be paid accordingly.

CHARLES J. SCHUCK, JUDGE, upon petition for rehearing.

In the matter of the claim of Elma Shepherd, the court having heretofore granted a rehearing and having again considered the facts adduced at the former hearing, as well as those presented at the subsequent hearing the court, including Judge Smith sitting for the first time during the regular October term,

again holds that the said claimant is entitled to an award, with the deducation, however, of $60.00 from the original award, which said amount of $60.00 was heretofore included in the first award and is now deducted because the testimony offered at the second hearing shows that the said amount, covering a period from January 1, 1944 to July 1, 1944, as an increase at the rate of $10.00 per month, was not allowed to any worker in Cabell county similarly engaged, and therefore the claimant would not be entitled to the increase, and her original award is accordingly reduced from $925.00 to $865.00, for which amount of eight hundred and sixty-five dollars ($865.00) an award is now made and recommended.

(No. 377—Claimant awarded $900.00 upon rehearing)

VIRGINIA WILSON, Claimant,

v.

STATE DEPARTMENT OF PUBLIC ASSISTANCE, Respondent.

Opinion filed January 17, 1945
Opinion on rehearing filed December 17, 1945

Syllabus in re the claim of *Shepherd* v. *Department of Public Assistance* reaffirmed and adopted.

Appearances:

W. S. Pettigrew, and *R. K. Talbott*, for the claimant;

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

The facts upon which this claim is predicated are similar in all respects to those presented in the claim of Elma Shepherd against the department of public assistance decided at the present

term, except that the claimant, Virginia Wilson, had a slightly higher rating on the preferred eligible list when dismissed without cause by the local agency of Cabell county, West Virginia. Upon appeal from said dismissal she was likewise reinstated by the state department and is entitled to her salary accordingly during the period of the said dismissal.

In accordance with the opinion heretofore filed in *Shepherd* v. *Department of Public Assistance*, we find for the claimant and make an award in the sum of nine hundred and sixty dollars ($960.00).

CHARLES J. SCHUCK, JUDGE, upon petition for rehearing.

For the reasons heretofore set forth in the supplemental opinion filed in the matter of the claim of Elma Shepherd against the department of public assistance, the award heretofore made to claimant, Virginia Wilson, is reduced in the amount of $60.00, and consequently an award is now made and recommended in the amount of nine hundred dollars ($900.00).

(No. 379—Claim denied)

JESSIE E. GARDA, Claimant,

v.

DEPARTMENT OF PUBLIC ASSISTANCE, Respondent.

Opinion filed January 17, 1945

Claimant not having been on the preferred eligible list at the time of her dismissal by the Cabell county unit is not entitled to a salary during the period of dismissal, even though the reasons for said dismissal are not sustained and claimant was fully exonerated. The preferred eligible list and ratings must control and govern in a period during which an emergency arises caused by the curtailment of the appropriation for the department and when it is found necessary to lessen the number of employees or "visitors."

Appearances:

W. S. Pettigrew, and *R. K. Talbott,* for the claimant;

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

The claimant, Jesse E. Garda, seeks an award in the sum of $1,380.00 for twelve months salary from July 1, 1943, to July 1, 1944, during which time she was not employed at her usual work of a "visitor" of the state department of public assistance having been dismissed July 1, 1943, without cause and then on October 31, 1943, having been formally charged with inefficiency and incomplete reporting. She was upon appeal to the merit system council fully exonerated and presents her claim in this court for her salary accordingly.

The basis of this claim is identical with that presented in the claims of *Elma Shepherd* and *Virginia Wilson* against the involved department, except that in claimant's case she was not on the preferred eligible list at the time of her dismissal on July 1, 1943.

As indicated in our opinions *in re Wilson* and *Shepherd,* the controlling feature governing favorable awards after the charges of inefficiency had not been sustained, was the fact that both the claimants Shepherd and Wilson were on the preferred eligible list by reason of their ratings and should have been employed in case any "visitors" were employed by the local board of Cabell county. This is upon the assumption that the rules, regulations and ratings of the merit system council, in fact, constitute civil service for the department's employees and that the employment of "visitors" must be governed accordingly. It may be true that others not rated as highly even as the claimant had some employment during the period in question, and while such employment was wrong and highly improper so far as the Cabell county unit's actions were concerned, yet this fact of itself does not entitle claimant to a rating sufficient to warrant making an award in her favor. We repeat, that we are governed by the ratings established by the merit system council and

especially so by the preferential eligible list as established during the emergency out of which these claims grew. Claimant was not on the preferred eligible list and consequently in our opinion is not entitled to an award. Accordingly an award is refused.

(No. 443-S—Claimant awarded $19.50)

F. J. HRANKA, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 18, 1945

CHARLES J. SCHUCK, JUDGE.

Claimant's automobile, while being driven by his wife in the city of Wheeling, at and near Eleventh and Market streets, on October 11, 1944, was struck by a state road truck and injured to the extent of $19.50, as shown by the invoice filed with the claim.

It appears that the state road truck in question, starting from the intersection of Eleventh and Market streets, after waiting for a green light in order to proceed, pulled to the right causing the rear wheel thereof to strike and damage claimant's car that stopped immediately beside and to the right of the said state road truck. The statement of the managing engineer of the prison labor division (the truck having been operated by a prisoner) contains the statement that the state road truck driver was negligent.

The state road commission recommends settlement in the amount of $19.50 and this recommendation is concurred in by the attorney general's office, through the assistant, W. Bryan Spillers. We, therefore, make an award in the sum of nineteen dollars and fifty cents ($19.50) in full settlement of the said claim.

(No. 444-S—Claimant awarded $149.00)

H. C. DEMPSEY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 18, 1945

CHARLES J. SCHUCK, JUDGE.

On October 12, 1944, at about 10:30 P. M. on a dark, rainy night, with limited visibility, the claimant was returning to his home from a neighbor's house, both located along U. S. route No. 119, Grafton, West Virginia. The claimant stepped off the highway and over the berm of the same, and in so doing stepped into an unprotected open catch basin and was injured to the extent of being obliged to lose three weeks of his work and to spend the sum of $35.00 in medical bills and medicines, making a total of $149.00.

No warning sign had been erected at and near the culvert and so far as we are able to determine, from the record as submitted, claimant had no notice whatever of the presence of the catch basin in question. A warning sign was later erected.

The state road commission recommends the payment of the aforesaid amount of $149.00 in full settlement of the claim as presented by the said H. C. Dempsey, claimant; the attorney general's office agrees to the said recommendation of payment. Accordingly, we make an award in favor of the claimant in the sum of one hundred forty-nine dollars ($149.00).

(No. 445-S—Claimant awarded $16.75)

OKEY CLARK, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 18, 1945

CHARLES J. SCHUCK, JUDGE.

From the record as submitted to us in this claim it appears that on September 7, 1944, while working on a secondary road in Doddridge county, known as No. 17, said work or grading being carried on by the employees of the state road department, a small section of pipe was uncovered in the said road, not removed from the highway but allowed to protrude therefrom, seemingly a hazard to the traveling public. Claimant's automobile, while being driven over the said portion of the said road under repair, struck the said pipe damaging his tire and tube and causing him to be obliged to expend the sum of $16.75 for repairs to the automobile. The report as submitted shows that the workmen employed in grading the said road passed over the said pipe but did not remove it, notwithstanding the fact that it was a hazard to travel at the time.

The state road commission recommends payment, and this recommendation is concurred in by the attorney general's office through his assistant, W. Bryan Spillers.

We, therefore, make an award in the sum of sixteen dollars and seventy-five cents ($16.75).

(No. 446-S—Claimant awarded $42.84)

KATHRYN E. CUSTER, Claimant.

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 18, 1945

CHARLES J. SCHUCK, JUDGE.

This is a claim in the amount of $42.84, claimed as damages for injuries to claimant's automobile caused by being struck or backed into by a state road truck, the accident happening at and near the intersection of Twenty-seventh and Chapline streets, in the city of Wheeling, October 3, 1944.

From the statement filed it appears that claimant's car was to the rear of the state road truck in question at the time and place mentioned, evidently waiting for the green light to show which would allow both cars to proceed. While claimant's car or automobile was to the rear of the said road truck as stated, the said truck started sliding backward for some reason and collided with and injured claimant's car to the extent of the damages heretofore mentioned. Seemingly there was no warning given to claimant until it was too late for her to move her car out of the path of danger. The report of the state road commission contains the statement that the driver of the state truck was at fault. The road commission recommends payment, and this recommendation is concurred in by the attorney general's office by his assistant, W. Bryan Spillers.

We, accordingly, make an award in the sum of forty-two dollars and eighty-four cents ($42.84).

(No. 409—Claimant awarded $150.00)

J. A. McKINNEY, Claimant,

v.

STATE ROAD COMMISSION, Respondent,

Opinion filed January 18, 1945

Appearances:

J. A. McKinney, in his own behalf;

W. Bryan Spillers, Assistant Attorney General, for respondent.

G. H. A. KUNST, JUDGE.

In the spring of the year 1944, employees of respondent engaged in blasting stone from the road near claimant's home at Crickmer, West Virginia, damaged his barn, chicken house, fence, beehives, killed twenty-one stand of bees, and threw approximately ten truckloads of rock into his field, for which damage claimant asks an award of $200.00.

The assistant attorney general stated that respondent did not contest its liability and that the only matter in issue was the amount of damages. After the introduction of the evidence of claimant and of several witnesses for respondent, claimant and representatives of respondent agreed that $150.00 was a reasonable and fair estimate of the damage, and respondent recommends and the attorney general approves its payment.

An award of one hundred and fifty dollars ($150.00) is made to claimant.

(No. 396—Claimant awarded $40.00)

ROY FAIRCHILD, *Trustee* FOR HOTCOAL COAL COMPANY, *a corporation*, Claimant,

v.

STATE AUDITOR, Respondent.

Opinion filed January 19, 1945

Appearances:

D. Grove Moler, for the claimant;

W. B. Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

The Hotcoal Coal Company, a corporation, organized and doing business under the laws of the state of West Virginia, pursuant to a corporate charter duly issued to it on October 30, 1941, engaged actively in business from the day of its incorporation until June 2, 1944, when, so far as the record reveals, it ended its business and began the process of dissolution. The certificate of dissolution was duly issued by the secretary of state dated the 7th day of July, 1944. In the petition claimant alleges that the corporation was not engaged in any business during the fiscal year beginning July 1944, and this allegation is not controverted in any manner. All the assets of the company were assigned to Roy Fairchild as liquidating trustee.

On May 5, 1944, the company paid a license tax of $40.00 to the state for the fiscal year beginning July 1, 1944, which payment, as alleged in claimant's petition, was made by a mistake on the part of the company officials and which allegation is also not controverted in any manner.

Under the circumstances, the payment in question having been made for a fiscal year during which the claimant was not in

existence or had not done any business and before the beginning of which fiscal year steps had already been taken to liquidate the company's affairs, the claimant is asking for a refund of the $40.00 paid as the license tax for the fiscal year beginning July 1, 1944. A claim was made to the state auditor for the refund or return of the said amount, but as the payment had been lawfully mingled with other funds the auditor could not make any refund or payment to claimant and consequently claimant seeks redress in this court.

Ordinarily the claimant would be without redress as has been heretofore held by this court in the matter of tax refunds, but we feel that unusual circumstances are presented which in equity and good conscience require that an award in the sum of $40.00 should be made and a recommendation made to the Legislature that the said amount as a refund be returned or paid to the claimant accordingly.

On June 13, 1944, at a called meeting of the stockholders, all stock being represented in person or by proxy, it was unanimously decided that the corporation be dissolved and a resolution in accordance with said desire was then adopted; notice of said dissolution was published in a newspaper of general circulation in Raleigh county, West Virginia, on June 23, 1944, and on June 30, 1944; the secretary of state was duly informed of said action but required a certificate to the effect that all accrued charter taxes and gross sale taxes had been paid. The stipulation agreed to by the claimant and counsel for the state shows that all charter taxes and accrued gross sale taxes were paid prior to July 1, 1944. The company performed no acts whatsoever as a corporation on or after July 1, 1944, and on June 13, 1944, the physical property and all unliquidated assets were assigned to one Roy Fairchild, in trust, to be liquidated by him for the benefit of the stockholders of the company.

From an examination of the record and the stipulation filed it would seem that everything that was required under the law to bring about the dissolution of the corporation in question had been done and performed previous to July 1, 1944, except a

certificate to the effect that all claims including charter taxes and gross sale taxes had been paid. This information was shortly thereafter furnished to the secretary of state and certificate of dissolution issued on July seventh following. In our opinion the mere fact that the certificate showing the payment of charter and gross sales taxes had not been incorporated in the report to the secretary of state when all other matters had been properly taken care of, so far as pertaining to the dissolution of the company was concerned, should not subject the company to a payment of a license tax for the year 1944 and that in equity and good conscience as heretofore indicated, return or refund of the $40.00 so paid should be made. Accordingly, an award in the sum of forty dollars ($40.00) is made and recommended to the Legislature accordingly.

(No. 436-S—Claimant awarded $451.00)

NATHAN CRIHFIELD, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 19, 1945

G. H. A. KUNST, JUDGE.

On the 3rd day of September, 1944, claimant and two companions were walking across a swinging bridge spanning Coal River at Maxine, Boone County, West Virginia, when part of the bridge, which was defective, gave way and all three fell eighteen feet. Claimant was seriously injured and for which injury a claim is made for $451.00. Respondent recommends and the attorney general approves its payment.

An award of four hundred fifty-one dollars ($451.00) is made to claimant.

(No. 441-S—Claimant awarded $69.62)

BETTIE T. GEMROSE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 22, 1945

ROBERT L. BLAND, JUDGE.

The claim in this case is in the sum of $69.62. The record thereof was made by the state road commission and filed with the clerk January 4, 1945. The state road commissioner concurs in the claim and it is approved for payment by the assistant attorney general.

It appears from the record of the claim that claimant's taxi, driven by her husband, was traveling at English, McDowell county, West Virginia, August 28, 1944, and as it passed state road commission truck No. 1030-68, which was standing still dumping a load as the taxi approached, the truck suddenly moved forward about four feet into the road, striking the taxi. The driver of the truck was looking back toward the load of slate which was being dumped.

We are of opinion that the damages caused by the collision may be repaired for the amount of the claim, and award is accordingly made in favor of claimant, Bettie T. Gemrose, for the said sum of sixty-nine dollars and sixty-two cents ($69.62).

(No. 424-S—Claimant awarded $240.00)

EFFIE SAVAGE PRATT, *Guardian* of Charles Layman Savage and Lois Elaine Savage, infants, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 22, 1945

ROBERT L. BLAND, JUDGE.

The facts supporting the claim in this case are particularly set forth in the opinion of Judge Elswick, in claim No. 227-S, *Effie Savage Pratt* v. *State Road Commission*, 2 Ct. Claims (W. Va.) 89, to which opinion reference is here made.

Said Effie Savage Pratt, former wife of Theodore Savage, is the mother of two children, Charles Layman Savage and Lios Elaine Savage, both infants. Charles Layman Savage was born May 6, 1933. Lois Elaine Savage was born August 31, 1935.

The record of the claim was prepared by the state road commission and filed with the clerk December 1, 1944. The head of that agency recommends that an appropriation be made in favor of each of said infants of $5.00 per month from January 1, 1945, to and including December 31, 1946. An assistant attorney general approves the payment of both of said amounts.

In view of the concurrence in the claim by the head of the state agency concerned and the approval of payment by the attorney general's office, and for the reasons set forth in the opinion of Judge Elswick above referred to, we recommend an award to Effie Savage Pratt, guardian of said two infants, viz, Charles Layman Savage and Lois Elaine Savage, in monthly payments of five dollars ($5.00) to each, from January 1, 1945 to December 31, 1946.

(No.—422-S—Claimant awarded $720.00)

ALICE E. McCLUNG, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 23, 1945

G. H. A. KUNST, JUDGE.

On January 25, 1936, claimant's husband, John McClung, while in the employ of respondent, received injuries in the course of his employment resulting in his death on February 9, 1936.

A claim under the shortened procedure provision of the Court of Claims Act was made and the court considered the factual and legal matters pertaining to said claim and made an award, all of which is fully reported in the court's opinion, 2 Ct. Claims (W. Va.) 83.

The claim now here presented is made for $720.00 to be paid in monthly installments of $30.00, from January 1, 1945 to December 31, 1946, 24 months, in continuation of the award made in the above mentioned claim.

Respondent recommends and the attorney general approves its payment. An award in the sum of seven hundred and twenty dollars ($720.00) is made to claimant, Alice E. McClung, payable in monthly installments of thirty dollars ($30.00) each.

(No. 423-S—Claimant awarded $10.00)

LOTTIE STUART, formerly LOTTIE SKELTON, *Guardian* of MARJORIE ANN SKELTON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 23, 1945

G. H. A. KUNST, JUDGE.

George Skelton, the husband of Lottie Skelton and the father of Marjorie Ann Skelton, in the course of his employment with respondent received injuries causing his death on October 17, 1935.

A claim under the shortened procedure provision of the Court of Claims Act was made and the court considered the factual and legal matters pertaining to said claim and made an award, all of which is fully reported in the court's opinion, 2 Ct. Claims (W. Va.) 85.

The claim now here presented is made for $5.00 per month for the months of January and February, 1945, in continuation of the award made in the above mentioned claim. Said Marjorie Ann Skelton, after February 28, 1945, will have reached the age of sixteen years, the time limit fixed for said payments.

Respondent recommends and the attorney general approves its payment. An award of ten dollars ($10.00) is made to claimant.

No. 402—Claim dismissed)

GEORGE COY, JR., an infant, by GEORGE COY, SR., his next friend, Claimant,

V.

STATE BOARD OF CONTROL, Respondent.

Opinion filed January 24, 1945

1. The jurisdiction of the Court of Claims does not extend to a claim for injury to an inmate of a state penal institution.

2. The West Virginia industrial school for boys at Pruntytown is held to be a penal institution within the meaning of section 14 of the act creating the Court of Claims.

Lee, Blessing & Steed (Howard B. Lee), for claimant;

Ira J. Partlow, Attorney General and *W. Bryan Spillers*, Assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

Claimant, George Coy, Jr., of Kessler, Greenbrier county, West Virginia, by George Coy, Sr., his next friend and father, filed his claim in this court on September 10, 1944, in the sum of $5,000.00, which amount, in equity and good conscience, he maintains should be discharged and paid by the state of West Virginia.

His petition alleges that on April 29, 1943, when he was fifteen years of age, by an order entered by the circuit court of Greenbrier county, he was duly committed to the West Virginia industrial school for boys, at Pruntytown, in Taylor county, West Virginia; and that on June 4, 1943, while in said school he was assigned and directed by the proper authorities thereof to work in the laundry, maintained and operated by the state of West Virginia on the premises of said school; that at the time he was so assigned and directed he was a youth of fifteen

years of age, and had never had any prior experience in working in a laundry or with or about machinery of any kind, and that he did not know and did not appreciate or understand, nor was his attention drawn or directed to the extremely dangerous and hazardous character of the work which he was required to do. He charges that it became and was the duty of the state, through its agents and servants in charge of said school, and laundry, by reason of his extreme youth and inexperience, to advise and inform him fully of the risk, danger and hazard incident to his work in the operation of said laundry, and to warn him against the danger to which he would be subjected in the performance of such work. He says that notwithstanding such duty, neither at the time of said assignment and direction nor while he was so employed in the said laundry did any person or persons connected with the school and laundry give him any instructions respecting the operation of the machinery and appliances used in and about the operation of the laundry, or warn him of the risks, danger and hazard to him in the operation of said machinery and appliances.

Claimant further alleges that notwithstanding the duty of the state and its agents and servants, he was assigned to operate what is known as an "extractor" which is in itself a dangerous instrumentality, and without any instructions or warning as to such danger; that at one time such extractor had been equipped with a lid or cover, but the same had been removed or lost for a number of months, and that while so operating said extractor he got his left arm caught in its machinery and mechanism, and the same was so bruised and mangled that it had to be amputated very near the shoulder, thus crippling him for life.

The attorney general has moved to dismiss the claim upon the ground that it is a claim for injury to an inmate of a state penal institution, which is excluded by section 14, article 2, chapter 14 of the code.

Claimant, in his petition, has seen fit to allege that said industrial school for boys is not a penal institution within the

contemplation of section 14, of the act creating the Court of Claims.

Section 14, article 2, chapter 14, of the code, provides as follows:

> "The jurisdiction of the court shall not extend to any claim:
>
> 2. For injury to or death of an inmate of a state penal institution."

Counsel for claimant has filed an able brief, citing many authorities in support of the proposition that the industrial school for boys at Pruntytown is not a penal institution. Counsel for the state have likewise filed able briefs in support of the motion to dismiss the claim on the ground that said school is, in truth and fact, a penal institution. Members of the court have devoted much time to the consideration of the question, and are not in agreement.

We deem it unnecessary to discuss the various authorities cited by counsel for claimant and counsel for the state.

Majority members of the court are of opinion that the West Virginia industrial school for boys at Pruntytown, is a penal institution within the contemplation and meaning of section 14 of the court act, and that the jursdiction of the Court of Claims to entertain the claim in question is excluded by the act.

Judge Schuck does not agree with the judgment of majority members of the court and will file a dissenting opinion.

The motion of the attorney general to dismiss the claim will be sustained, and the claim is accordingly dismissed.

CHARLES J. SCHUCK, JUDGE, dissenting.

As set forth in the petition filed with this claim and further outlined in the majority opinion, the claimant, George Coy, Jr., was committed to the Pruntytown school for boys, on April 29, 1943, when he was fifteen years of age; and shortly thereafter, or about June 4th of the same year, while engaged

or employed in doing certain laundry work, and at a time when the petition alleges that he had never had any previous experience in working in and about machinery of any kind, and which machinery, according to the petition filed, was of a dangerous and hazardous character, claimant was so badly injured by having his arm mangled in the said machinery as to necessitate its amputation, and thus make him a cripple throughout the remainder of his life.

The sole question presented here for our determination, upon the motion to dismiss heretofore interposed by the state, is whether or not the boys' industrial school at Pruntytown is a penal institution, since the act creating the Court of Claims, prohibits us from considering any claim for damages that has arisen in any manner by reason of injury to an inmate while confined in a penal institution.

The seriousness of the claim and the nature of the injuries require that most careful consideration be given to the determination of the question involved in order that justice may be done.

An examination of all the various acts, beginning with the act of 1889, creating the Pruntytown institution and following through with the Acts of 1908, 1913, 1919 and the subsequent acts, show conclusively to my mind that the Pruntytown school is purely a correctional institution where boys of tender years who may have, by reason of their acts, become a detriment or a menace to society, can be put in the custody of the state authorities, where parental care shall be administered in such a fashion and manner as to regenerate and rebuild the boy in qestion and seek to make him a worth-while citizen when he stands on the threshold of manhood.

An impartial investigation of the provisions of these several statutes, now combined into the juvenile delinquency statute, shows beyond all question that it was the intention of the various legislatures, as well as of the authorities of the state in charge of the institution, to have boys committed there after a hearing by the juvenile court authorities and without a formal

conviction for some criminal offense in the criminal courts of our state. It is true that it is also provided that where a minor under the age of sixteen years has been convicted of a felony or of a misdemeanor, the judge of the said court is vested with the discretion of committing such minor to the reform school at Pruntytown, having in mind particularly the character of the reform school as a place of reform, and not of punishment, and so may order the boy so convicted, removed to and confined in said reform school. This language following the statute is, of itself, in my judgment, sufficient to establish the fact that in the minds of the legislators first creating the institution, it was treated wholly and solely as a reformatory and not as a place of punishment. This is further shown by subsequent acts, the whole tenor of which is the matter of reformation and reform and not of punishment for crimes that may have been committed.

Perhaps it would be well to consider the definition of the word "penal" in connection with the determination of the involved question. Webster, in the International Dictionary, defines the word "penal" in part as follows:

> "Of or pertaining to punishment or penalties; as: *a* Designed to impose punishment; . . . *c* Inflicted as, or constituting, punishment or penalty, or used as means of punishment; . . ."

Words and Phrases, Vol. 31, p. 579, defines penal as follows:

> "The words 'penal' and 'penalty' strictly and primarily denote punishment, whether corporal or pecuniary, imposed and enforced by the state for a crime or offense against its laws."

Surely from these definitions no comfort can be obtained in relation to their application to the institution at Pruntytown by simply saying that a school intended by the various legislatures and the officials of the state to be one created for the purpose of helping a child or a boy of immature age, could possibly fall within the meaning of those definitions. It is very plain to my mind, therefore, that no state institution may be classed as a "penal institution" within the meaning of the

statute referred to, unless it is established and presently maintained as a place of "punishment" for those who intentionally violate the laws of the state. It is my contention that impartial examination of our statute, relating to the creation and establishment of this industrial school, inevitably leads to the conclusion that it was never intended that the school should be a place of punishment or a penal institution in the sense understood by the definitions given above, but rather a place where, through the gentle and proper administration of quasi-parental authority the boy's habits and disposition may be so changed as to make him a worthwhile citizen.

The majority opinion simply makes the unqualified statement that in the judgment of the judges rendering the opinion, Pruntytown is a penal institution and contemplated as such within the meaning of section 4 of the act creating the Court of Claims, but offers no authorities whatsoever to sustain such conclusion. I have looked in vain, in a rather extensive examination of the authorities of other states, this matter never having been decided by our state courts before, for any conclusion or opinion that would sustain the majority opinion, but have found none. On the other hand, I have found that where this matter has been tested, the courts have been unanimous in holding that an industrial school is not a penal institution. See *House of Refuge* v. *Ryan*, 37 Ohio State, 197; *Roth & Boyle* v. *House of Refuge*, 31 Md. 329; *Milwaukee Industrial School* v. *Milwaukee County*, 40 Wis. 328; 22 Am. Rep. 702; *Commonwealth* v. *Fisher*, 62 Atlantic 198; 213 Pa. 48; *Wisconsin Industrial School for Girls* v. *Clark County*, 103 Wis. 651; 79 N. W. 422.

In *House of Refuge* v. *Ryan*, 37 Ohio State, *supra*. at p. 203, the court said when referring to the commitment to the house of refuge:

> "The commitment is not designed as a punishment for crime, but to place destitute, neglected and homeless children, and those who are in danger of growing up as idle and vicious members of society, under the guardianship of the public authorities, for their proper care, and to prevent crime and pauperism."

In *Roth & Boyle* v. *House of Refuge*, 31 Md. *supra*, the Court said:

> "The House of Refuge is not a prison, but a school where reformation and not punishment is the end; . . ."

The court in this case further indicated that the mere fact that the institution in question may be used as a prison for juvenile convicts did not change it from a reformatory to a prison. The Ohio court also said in *House of Refuge* v. *Ryan*, *supra*, that the institution in question was a home and a school, not a prison. In *Milwaukee Industrial School* v. *Milwaukee County*, 40 Wis., *supra*, the Court said (point 6 of *syllabi* and at p. 333):

> "The commitment of the child to an industrial school, as authorized by the statute, is not an imprisonment.
>
> ". . . When children must be confined for crime, common humanity to them, common regard for the future welfare of the State, requires, in many cases, that they should be sent to some place of detention . . . where they may have a reasonable opportunity of becoming better, instead of worse, by their confinement; where the prison authorities are not their mere jailers, but are charged with parental duty as well as with parental authority; and where education for good is not only not excluded, but is made a condition of their restraint."

Under the force of these authorities, each one of them applicable to the condition that is presented to this court in the petition as filed in this claim, and considering further the attitude of our own state authorities, in classifying these institutions, must we not justly and properly contradict the statement that Pruntytown is a penal institution?

It is fundamental that persons sent to or committed to a penal institution must first be tried and convicted of a criminal offense in the manner provided for by the constitution and laws of a state and sentence duly and lawfully imposed in accordance therewith.

No state can legally condemn or imprison criminals in any other way, and to do so would be a gross violation of the constitutional rights of even the lowest and meanest criminal.

May I ask, then, does the record before us prove that claimant has ever been convicted of a crime in a court of competent jurisdiction and given a sentence accordingly, to a penal institution? We look in vain for an answer so far as the proceedings in the instant claim are concerned, and we are rewarded only by the contention that there are bars on some of the windows at Pruntytown and therefore those detained there are criminals, no matter how young and immature, irrespective of home environments that led to their confinement and notwithstanding the fact that they had never been convicted as provided by our own state constitution and criminal statutes; and notwithstanding that further no authority can be found that sustains the proposition or assumption that schools similar to Pruntytown are penal institutions. The state board of control, in charge of this institution, itself in its reports, does not classify this school as a penal institution; nor does our own "Blue Book" classify it as such.

If Pruntytown is a penal institution, which by reason of the very term brands those confined there as criminals, and puts upon them an everlasting stigma that will be detrimental throughout the remainder of their lives, then by the same line of reasoning the girls' school at Salem and other similar institutions that we have for the reformation of youth throughout the state must be likewise classed. This conclusion shocks the conscience and makes us appreciate full well the significance of the phrase "man's inhumanity to man."

I cannot lend my judgment to the conclusion of the majority: not only is this now sixteen year old boy crippled for life, seemingly through no fault of his own, but we would now put upon him a further stigma at his tender age of being a criminal by reason of the fact that the juvenile court committed him to Pruntytown for reformation, instruction and further education.

I would overrule the motion heretofore made and filed by the state and hear the claim on its merits.

(No. 447-S—Claimant awarded $75.00)

JOHN AFRICANO, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 1, 1945

G. H. A. Kunst, JUDGE.

On August 16, 1944, respondent had at the railroad siding at Granville, in Monongalia county, West Virginia, a storage tank containing ninety-six hundred gallons of asphalt. Fire of unknown origin, supposed to have been incendiary, destroyed the storage tank and a tank heater. Employees of respondent having negligently neglected to securely fasten the cover on the opening in the top of the tank, when the supports of the tank, by reason of the heat, collapsed, the tank fell and the fluid asphalt ran from the opening in the top of tank over the victory garden of claimant on land adjoining that on which the tank stood.

The garden contained growing vegetables which the hot asphalt completely destroyed. Claim is made for $75.00 damages. Respondent recommends and the attorney general approves its payment.

An award of seventy-five dollars ($75.00) is made to claimant.

(No. 448-S—Claimant awarded $75.00)

SAM OFSAY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 1, 1945

G. H. A. KUNST, JUDGE.

The facts stated in the case of John Africano, No. 447-S, are the same as in this case, except the damages of $75.00 asked by claimant are for damages to the lot on which said garden of John Africano was growing, and is owned by claimant herein. Reference is made to said claim No. 447-S for a complete statement of facts.

Respondent recommends and the attorney general approves payment of the claim. An award of seventy-five dollars ($75.00) is made to claimant.

(No. 453-S—Claimant awarded $32.13)

MAYFORD HUGHART, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 1, 1945

G. H. A. KUNST, JUDGE.

At seven-thirty o'clock on November 3, 1944, when a truck, No. 130-94, owned by respondent and an automobile owned by claimant, had stopped at a railroad crossing at Bigley

avenue, in Charleston, West Virginia, awaiting the passing of a train, the driver of the state truck negligently backed the truck into the front of the automobile, causing damage to it, which cost $32.13 to repair and for which amount claim is made. Respondent recommends and the attorney general approves its payment.

An award of thirty-two dollars and thirteen cents ($32.13) is made to claimant.

(No. 455-S—Claimant awarded $7.50)

DR. ROY O. BOWLES, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 1, 1945

G. H. A. KUNST, JUDGE.

At four-thirty o'clock P. M. on January 13, 1945, at Pliny, in the county of Putnam, state of West Virginia, the driver of truck No. 30-135, owned by respondent, negligently turned said truck from a rut in road in such manner as to cause the rear wheels of the truck to strike the fender of a parked Chevrolet sedan automobile owned by claimant. Claim is made for $7.50, the amount it cost to repair the damage to fender.

Respondent recommends and the attorney general approves its payment.

An award of seven dollars and fifty cents ($7.50) is made to claimant.

(Nos. 450-S, 451-S, 452-S—Claimants awarded $57.82, $15.00, $92.28)

OHIO VALLEY BUS COMPANY, SALLIE HOARD and PHILLIP ADAMS, Claimants,

V.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 2, 1945

CHARLES J. SCHUCK, JUDGE.

These claims arise by reason of an accident that resulted from a state road truck running into and striking a bus owned by the Ohio Valley Bus Company, of Huntington, West Virginia. The accident happened on December 8, 1944 on Sixth avenue between Elm and Sixteenth streets in the city of Huntington, West Virginia. The claimant, Sallie Hoard and claimant Phillip Adams were passengers on the bus in question. The bus was traveling west on Sixth avenue between Elm and Sixteenth streets in the said city of Huntington and the said road truck involved was traveling east and on the wrong side of the street. The bus pulled to the extreme right with the right front wheel on the curb of the street to avoid a collision, but notwithstanding this fact the bus was sruck by the state road truck by reason of the negligence of the state road operator in operating his truck.

The record shows further that he was fined in the police court of Huntington for reckless driving on this occasion. The record further shows that a thorough investigation was made by the special investigator for the road commission who recommends the payment of the claims in question in the following amounts to wit: Ohio Valley Bus Company, $57.82; Sallie Hoard, $15.00; Phillip Adams, $92.28. Settlement in the aforesaid amounts to the respective claimants is authorized by the state road commission and agreed to by the attorney general's office. Accordingly an award is made to the said Ohio Valley Bus Company in the amount of fifty-seven dollars and

eighty-two cents ($57.82); to the claimant Sallie Hoard in the sum of fifteen dollars ($15.00), and to the claimant Phillip Adams the sum of ninety-two dollars and twenty-eight cents ($92.28). Said sums to be in full settlement of all damages of all kind, personal or otherwise, caused by reason of the accident in question.

No. 454-S—Claimant awarded $97.60

L. D. SPENCE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 2, 1945

CHARLES J. SCHUCK, JUDGE.

Claimant's automobile while being driven along the highway near Quinwood in Greenbrier county, on December 21, 1944, was stuck by a snowplow owned and operated by the state road commission. The record reveals that the operator of the snowplow was engaged in removing the snow from the upper side of an elevated curb and while so doing his snowplow slid into claimant's car causing the damage complained of and amounting to $97.60. One Pearl Spence, the wife of claimant, was in the car at the time and suffered minor injuries. The amount of damage aforesaid is by agreement in full settlement not only for injuries to the automobile, but for any personal injuries suffered by claimant or his wife the said Pearl Spence.

The state road department recommends settlement in the aforesaid sum and this settlement is approved by the attorney general's office. We, therefore, recommend an award in the amount of ninety-seven dollars and sixty cents ($97.60), accordingly, to the claimant, and suggest that upon receipt of the aforesaid amount both the claimant and his wife, Pearl Spence, shall sign and execute a full and complete release.

(No. 457-S—Claimant awarded $8.16)

JACK HEADLEY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 2, 1945

ROBERT L. BLAND, JUDGE.

The claim in this case is for the sum of $8.16. It arises out of an accident with state road commission truck No. 320-13. On December 28, 1944, claimant's DeSoto automobile, bearing West Virginia license No. 152-392, was parked on a state controlled road at Vienna, in Wood county, West Virginia, when said state road commission truck, operated by R. O. Corley, an employee of the road commission, skidded and collided with it, damaging its right rear fender shield, which had to be straightened, welded, and aligned. The actual and necessary cost for this repair work was the amount of the claim. Respondent admits that the state truck was at fault. The head of the agency concerned concurs in the claim. Its payment is approved by an assistant attorney general.

Upon the showing made by the record, prepared by the state road commission and duly filed with the clerk February 1, 1945, an award is made in favor of claimant Jack Headley in the sum of eight dollars and sixteen cents ($8.16).

(No. 458 S - Claimant awarded $30.62)

COLUMBIAN CARBON COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 2, 1945

ROBERT L. BLAND, JUDGE.

On October 24, 1944 state road commission truck No.-530-31 was being operated by R. T. Brotherton on state route No. 21, two miles north of Ripley, in Jackson county, West Virginia. Claimant's Chevrolet 1942 automobile, driven by Herman F. Bode, was following the truck. The road was wet and slippery. The state truck was making a left-hand turn in the road and its driver did not see claimant's car traveling behind it. The two vehicles collided. Claimant's car was damaged in consequence of the impact. The repair bill amounted to $30.62 as shown by an itemized statement made part of the record. For this sum claimant filed his claim with the state road commission. The head of that agency concurred in the claim. Its payment was approved by an assistant attorney general. A record of the claim was prepared by respondent and filed with the clerk on February 1, 1945. The claim is informally considered by the court upon that record.

An award is made in favor of Columbian Carbon Company for the sum of thirty dollars and sixty-two cents ($30.62).

(Nos. 432, 433, 434—Claimants awarded $1500.00; $250.00; $100.00)

ROBERT RAGASE, CLARENCE BROWN AND MARY ALICE EMERICK, an infant, by WILLIAM P. BRADFORD, her next friend, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 2, 1945

Appearances:

Mose Boiarsky and *John T. Copenhaver,* for the claimants;

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

These several claims arose by reason of an accident that happened on August 19, 1944, on the highway commonly termed "the narrows" in Marshall county, West Virginia. Claimants were in an automobile, driving north, when a state road truck, operated by a prisoner, collided with the said car from the rear, completely demolishing the car and slightly injuring occupants. Liability on the part of the state road commission was admitted by the respondent and we are concerned here only with the amount of damages sustained by each claimant.

The testimony shows, with reference to the claimant Robert Ragase, that he was the owner of the automobile, that the said automobile was so badly damaged as to be useless and beyond repair. The testimony further shows that the ceiling price at the present time for the said automobile was approximately $900.00. Claimant Ragase was carrying valuable property in the nature of cameras, film, reflectors and other incidental equipment, part of which was used in connection with his occu-

pation and profession. He sustained some injuries, which required treatment and for which his hospital and doctor bills amounted to approximately $55.00 or $60.00. Taking into consideration the nature of the injuries, and the fact that they were not serious in any way, together with his property loss, we feel that an award of $1500.00 would be proper and would fully cover all damages, both to himself and to his property, that the claimant Ragase has sustained. Accordingly an award is made in the amount of fifteen hundred dollars ($1500.00).

The claimant Clarence Brown was rendered unconscious at the time from the blow occasioned by the impact of the automobile and truck and was obliged to pay a doctor bill and hospital bill amounting to approximately $40.00. He also was obliged to purchase new eyeglasses, which, together with the examination, entailed an outlay of $35.00. He lost two weeks' work. In view of the nature of his injuries and his property loss, it is our opinion that he is entitled to an award of two hundred and fifty dollars ($250.00), and we recommend this award accordingly.

The claimant Mary Alice Emerick's injuries were very minor, and while her legs and thighs were bruised no injuries of any consequence were sustained. She had no doctor bill, although she maintains this was occasioned by reason of the fact that a relative of hers was a doctor and through courtesy of the profession she was not charged for any service. She did sustain the loss of a suitcase, a pocketbook and shoes, and some other personal property. Considering the nature of her injuries and her property loss as well we are of the opinion she is entitled to an award of one hundred dollars ($100.00) and recommend an award in that amount.

(No. 393—Claim denied)

ACHILLES T. ROBISON, Claimant,

v.

STATE BOARD OF CONTROL, and STATE ROAD COMMISSION, Respondents.

Opinion filed February 2, 1945

Under the act creating the Court of Claims negligence on the part of the state agency involved must be fully shown before an award will be made.

C. R. Morgan, for claimant;

Ira J. Partlow, Attorney General, and *W. Bryan Spillers*, Assistant Attorney General, for respondents.

ROBERT L. BLAND, JUDGE.

Achilles T. Robison, a former city mail carrier at New Martinsville, seeks in this case an award of $26,988.35, and bases his claim on alleged negligence of the state board of control and the state road commission, their officers and employees, in allowing a convict with a dangerous criminal record to be transferred from the penitentiary at Moundsville to a prison road camp, and escape therefrom and attack and do him great bodily injury.

Claimant, who resides in the country, about one mile from New Martinsville, the county seat of Wetzel county, further elucidates his claim by saying that in the afternoon of May 6, 1944, after concluding his duties as a mail carrier on that day, he went to his home; and, his wife and son being absent, he secured a key to his residence and entered the house, where he was confronted by one James Clark, alias James McCune, alias Joseph Kurosi. Clark had in his possession a double-barreled, 12-gauge shotgun, the property of claimant. With this gun he deliberately shot claimant in both of his legs. He then demanded and obtained what money claimant had in his possession and

drove away in claimant's Buick automobile. Claimant was taken to the hospital at New Martinsville, where his wounds were cleansed and he was given blood plasma and a blood transfusion. Thereafter it was found necessary to amputate his right leg. After this was done gangrene set in and it was found expedient to perform a second amputation of the limb.

Claimant was forty-six years of age at the time he was shot by Clark and was earning $185.00 per month. His injuries are such that he will never be able to resume the duties of a city mail carrier. As a result of the injuries inflicted upon him he has lost the benefit of his employment in which his salary would have increased at intervals. He has incurred heavy expenses in surgical, hospital and home treatment; and, although he has procured an artificial limb, there are shots in his knee that render the use of it exceedingly uncomfortable.

Claimant submits an estimate of the costs which have been and will be incurred by him due to the injuries inflicted upon him by Clark, as follows:

Dr. J. O. Theiss	$ 200.00
Miss Imogene Thomas, registered nurse	230.00
Mrs. Clyde Clegg, R.N., New Martinsville	12.00
Miss Rosamond Tiber, registered nurse	217.00
Wetzel County Hospital	517.60
Penicillin from Ohio Valley Hospital	92.75
Iama ambulance	7.00
Loss of time from May 6, to July 15, 1944	362.00
Estimated cost of artificial limb	200.00
Estimated cost of reshaping leg	150.00
Loss of Leg	25,000.00
	$26,988.35

Claimant's testimony relates to his injuries and nothing stated by him sheds any light upon the circumstances attending the escape of Clark from the prison road camp.

The state has entered a general denial of responsibility or liability, and contests the right of claimant to an award. It denies

the negligence imputed to it, and it therefore becomes necessary for claimant to prove by a preponderance of evidence the negligence on which he relies to support his claim. To do this claimant demanded the production by the state of Clark's criminal record. This demand was promptly complied with and the following record produced:

"For

(PHOTOGRAPH)
(a front and side view)

West Virginia Penitentiary
32745

Marks and Scars: Small scar right shoulder. Tatts: Skull with 2 bars above and Death Before Dishonor below, right lower outer arm, question mark, right middle finger. Tattoo heart on chest, with initial Pop and Mom. Small heart with cross and number 13 below left shoulder. Spread eagle with U. S. Marine Corps and L. K. in body of eagle. Scroll with name Lena and two dice below. Dim Tatt: Initial J. G. below left lower outer arm.

CONDUCT RECORD

Date	*No. Rep.*	*Offense*	*Penalty*
2- 6-43	1	Escape Huttonsville, 1-24-43	6 Mos. Red & White. All G. T. L. Hold for Crt.
3-24-43	2	Unnecessary Noise on R&W.	3 Days Guard House.
3-26-43	3	Destroying State Blanket	5 Days Guard House.
6- 5-43	4	Creating Disturbance in Cage After the Lights Were Out	5 Days Guard House.
6- 7-43	5	Creating Disturbance on Red & White for Three Nights	5 Days Guard House.
8-26-43	6	Thowing Medicine in Spit Can	5 Days Guard House.
3-23-44	7	Possession of Sweater Charged to Floyd Larch No. 31741	2 Days Guard House.
6-13-44	8	Escaping from Road Camp No. 80 5-4-44	6 Mos. Red & White. All G. T. L. Hold for Court.
7-17-44	9	Sleeping in on Morning Count	2 Days Guard House.
8-20-44	10	Writing to Party, Claiming Her To Be His Sister When She Is Not	30 Days Writing Privilege.

ASSIGNMENT AND TIME EARNED

Assignment	*Out*	*Expiration*	*Returned*	*Earned*
Unassigned	Nov. 24-42			
Huttonsville	Dec. 29-42		Escaped	
Red & White	Feb. 6-43			
Unassigned	Aug. 6-43			
R. C. 77	Aug. 31-43	May 10-49		
Unassigned	Sep. 16-43	May 5-49	Sep 16-43	5 Days
Dining Room	Jan. 20-44			
Unassigned	Mar. 11-44			
R. C. 80	Apr. 19-44		Escaped	
Unassigned	Jun. 10-44			
Red & White	Jun. 12-44			

O. S. Expiration *O. S. Exp.* *O. S. Parole* *O. S. Parole*

Name: Clark, James Male 32745

Aliases: James Carrie, James McCune
James Freeman McCune (Correct Name)

Race: White County: Cabell Crime: Burglary (Day)

Convicted	Oct. 23-42	Eff Sentenced	Aug. 24-42
Sentenced	Oct. 23-42	Received	Nov. 24-42
Full Time	Aug. 23-52	Expiration	Oct. 10-52
Term Given	1 to 10 Yrs.	Recom. Sent.	Gen'l
Eligible for Parole Now		Applied	

Hold RANDOLPH COUNTY For WETZEL COUNTY

New Number to be Given at Expiration of Above Sentence. Received Life Sentence from Wetzel County Court for Armed Robbery.

Age: 19 Height: 6-1 Weight: 159 Complexion: Fair
Color Eyes: Blue Hair: Dk. Brown Marital Status: Married
Occupation: Truck Driver Birth Place: Pittsburgh, Pa.
Where Nat' R'd.
Nation: U. S. A. If Alien
Religion: Protestant Education Limit: High School
Tobacco: Yes Alcohol Yes Narcotics: No
Military: U. S. Marines F. 2nd Bat. 7th Marine Pvt.
Address of Parents, Relative or Friend. F-Father, M-Mother, S-Sister, X-Friend, W-Wife.
M: Mrs. Margaret Lan, 2037 W. 47th St., Cleveland, O.
G/M: Mary S. Kaull, Kingsville, O.
W: Grace McCune, 3188 W. 90th St., Cleveland, O.

(Out to Court 9-22-44. Ret'd 9-22-44.

Former Felony Convictions. . . . Misdemeanors in Reformatories.

Arr. Vernon, Texas 4-25-42 for Fed. Auths. Rel. Authorities Wichita Falls, Texas, Impersonating a U. S. Marine Officer, Trans. to Dallas, Texas. Subject Wanted as a Deserter from U. S. Marines. Admits: Boys Ind. Sch. Lancaster, Ohio, 1939, Auto Theft, Indef. Term 2 Years. Paroled to Join U. S. Marines. Admits Arr: Hudson, Ohio, 1939 B&E. Given 1 Year Prob. Violated. Admits Arrested Cleveland, Ohio, Several Times for Misdeameanors."

David Hinerman, a guard at the West Virginia penitentiary at Moundsville, called as a witness by claimant, testified that on one occasion he "heard James Clark make the remark that if he got out right away he would try to go straight and behave himself, and if he had to serve ten years he would shoot everybody who got in his way," and that similar remarks were frequently made by prisoners at the institution. Clark was at that time serving a sentence of from one to ten years for "breaking and entering." This was about two months before Clark was sent from the prison to the prison road camp at Reedy, West Virginia.

Claimant also produced Carl F. Montgomery, captain of the guard at camp 80, the only armed prison labor camp in the state. He testified that on May 4, 1944, James Clark, an inmate of the penitentiary, who had been transferred to prison labor camp No. 80, was one of three prisoners who escaped from this camp on May 4, 1944. He stated that W. E. Phalen was guard on duty when these escapes were effected, and that he had never before lost a prisoner. Witness also testified as to the general efficiency, watchfulness and reliability of Phalen as a guard. He expressed the opinion that Phalen was guilty of no dereliction of duty in the escape of Clark from the quarry at which he was working.

The foregoing is a substantial summarization of the evidence adduced and relied upon by claimant to establish a *prima facie* right to have the Court of Claims recommend to the Legislature an appropriation in payment of his claim.

To meet and rebut the charge of negligence in allowing the escape of Clark from the prison labor camp, H. H. Cottle, deputy warden of the penitentiary, Carl F. Montgomery, captain of

the guard at Camp 80, R. M. Coiner, chief road guard, William E. Phalen, guard on duty at the time of the escape of Clark, Lloyd E. Phillips, guard at camp 80, Berton Blake, guard at the same camp, Clinton H. Hill, quarry foreman of the prison labor division of the state road commission, and William Willoy, another guard in the same division, were called by the state as witnesses.

In the opinion in the case of Claim No. 228, *Johnson* v. *State Road Commission*, 2 Ct. Claims (W. Va.) 203, it is said:

> "It is provided by statute in West Virginia that all male persons convicted of felony and sentenced to imprisonment or confinement in the penitentiary, or so many thereof as may be required by the state road commissioner, shall, as incident to such sentence or confinement, constitute the state road force, and as such may be employed under the supervision of the state road commissioner in building, surfacing and maintaining roads under the supervision of the state road commissioner, code, chapter 17, article 5, section 1.
>
> "The warden of the penitentiary prepares for the state road commissioner a monthly report which shows the names of not less than five hundred inmates of the penitentiary who are suitable for road work. From said list the road commissioner selects the number needed for road work, *Supra*, sec. 2."

Under authority of law in such case made and provided the state road commission maintains a prison labor camp at Reedy, in Wetzel county. There have been as many as 205 convicts from the penitentiary there at one time. All of these men were persons who have been convicted on charges of felony and sentenced to confinement in the penitentiary. James Clark was one of the convicts transferred from the penitentiary to the prison labor division of the state road commission. He was so transferred under lawful authority. A quantity of rocks had been quarried at Hill's quarry. Clark was one of ten convicts sent from camp 80 to this quarry to load these rocks into dump trucks, to be taken out on the road to knapping crews. William

E. Phalen was assigned as guard over the men. He had been a prison guard for approximately three years. He was stated to be an exceptionally good guard. Prior to May 4, 1944, he had "never lost a man."

The face of Hill's quarry is three hundred feet in width. Its height is approximately seventy-five feet. The stones which had been taken from the quarry were stacked in piles on three sides. The piles on the quarry side were so built as to leave a small passageway between the face of the quarry and the long stone pile. The stones were of such size that the prisoners could lift them and place them in the trucks. The stone piles on the face of the quarry side were as "high as a man's head." They precluded a view of the passageway between the row of rocks and the face of the quarry. Two dump trucks were being used. Guard Phalen was stationed straight in front of the trucks, and about thirty feet from where the prisoners were working. The guard was armed with a sawed-off shotgun. The prisoners were "bunched" around the trucks. Phalen caused the prisoners to begin the loading of the stones from the right-hand side of the rows of stones. When these rocks had been removed by the trucks the prisoners worked from the right side of the pile in front of the face of the quarry toward the left. While the convicts loaded the truck Phalen could not see the passageway between the long row of stones and the face of the quarry. When behind the truck where they could not be seen, the prisoners removed a sufficient number of stones to effect an entrance to the passageway between the row of stones and the face of the quarry, and in that way Clark and two other prisoners made their escape. The guard explains their action in these words: "So, while these men were picking up stones from the pile on the ground and loading them into the dump trucks three of them got through an opening that they had made by loading the stone into the truck." The guard could not reasonably have seen the men behind the truck.

When the escape of the men was discovered guard Phalen directed a truck driver to go to the camp and notify the captain of the guard as to what had occurred. State police and other officials

were given immediate notice and a prompt search was made to apprehend the convicts.

The evidence as a whole refutes the charge of negligence. Majority members of the court therefore find the state free from negligence and dismiss the claim. Judge Schuck will file a dissenting opinion.

G. H. A. KUNST, JUDGE, concurring in part.

I concur in Judge Bland's opinion that negligence of respondent contributing to the escape of this convict is not proven; also that an award should be denied claimant.

I do not concur in the doctrine that if negligence of respondent contributing directly to his escape had been fully shown that respondent would have incurred liability.

Kuhns v. *Fair*, 124 W. Va. 761; 22 S. E. (2d) 455, holds that the custodian of convicts is not personally liable for a tort committed by a convict, unless, by breach of duty, he directly participated in the commission of the tort.

Negligence is the breach of duty considered. In the Supreme Court case negligence contributes to, or is the proximate cause of the tort; in the other, between the negligence and resulting escape and the tort there is an intervening criminal act of a responsible agency; the causal connection between the first negligent act and the tort is broken. The last act in legal contemplation is regarded as the sole cause of the tort, the proximate cause thereof.

Negligence to be actionable must be the proximate cause of the injury. Proximate cause is the superior, or controlling agency as distinguished from incidental or subsidiary cause. It is the last negligent act contributing thereto and without which such tort would not have resulted.

No recovery can be allowed against a defendant for an injury which resulted from a criminal act of a third person, although there existed at the time a condition which made the act pos-

sible, or less difficult to accomplish and which was produced by the negligence of defendant.

In the instant case, negligence of the guard and respondent is not proven. Preponderance of evidence is to the contrary. And if negligence contributing directly to the escape had been proven, it would not have constituted the proximate cause of the injury to claimant.

The opinions cited and relied upon by counsel for claimant are not in point and do not apply to the facts of the case.

In my opinion, the correct legal doctrine applicable to the facts in this case, was stated by me in my concurring opinion in the case of *Herbert Fisher* v. *State Board of Control*, 2 Ct. Claims (W. Va.) 428, as follows:

> ". . . A defendant's negligence is too remote to constitute the proximate cause, where an independent illegal act of a third person intervenes, which, because it is criminal, defendant is not bound to anticipate, and without which such injury would not have been sustained. . . ."

Very much legal authority supporting this doctrine is cited by the attorney general in his brief filed herein, which I shall not encumber the record by repeating.

CHARLES J. SCHUCK, JUDGE, dissenting.

An analysis of the majority opinion as rendered in this claim presents but one issue, namely, whether or not there was negligence on the part of the state agency involved. It becomes necessary, therefore, to analyze the facts as presented to the court and to determine from these facts whether or not there was negligence on the part of the guard involved, and, in my judgment further, whether there was negligence on the part of the department or agency having charge of the work in failing to have a sufficient number of guards to supervise and control the work of the convicts who were employed on the project.

As set forth in the majority opinion, the evidence shows that the quarry in question was about three hundred feet long and

seventy-five feet high, and it is virtually admitted that it would be impossible for an escape to have been made up over the face of the quarry. The prisoners, ten in number, were loading stone on two trucks, to be conveyed to the highway that was being improved in a nearby section of Wetzel county. The stone had been placed in piles and although there is no direct testimony of any kind as to the manner of the escape, it is assumed and maintained as a defense that the prisoners in question must have gotten behind the piles of stone and thus eventually made their escape from the project. The work of loading the stone took place about the middle of the quarry, which left at least a hundred feet of the quarry itself exposed on either side of the trucks that were being loaded, and so far as the evidence reveals, with no obstruction that would prevent a watchful guard from seeing the men if an attempt to escape was being made. The testimony fails to show definitely how long the prisoners had escaped before their absence was noted. It is assumed that a space of seven or eight minutes elapsed before their action was noted. The guard in question, William E. Phalen, maintains that the men escaped through an opening in the stone pile, but a review of his testimony reveals the fact that the stone piles in question left an open, unobstructed space of at least a hundred feet on either side through which no convict could escape without being detected or seen if the guard was exercising the degree of care necessary under the circumstances. He maintains (record p. 77) that he could not see them behind the truck that was being loaded. This fact of itself, to my notion, constituted negligence in that he ought to have placed himself so that he could have seen the prisoners at all times, or, if this is not true, and assuming that his statement is correct, then the department involved was in my judgment negligent in not supplying him a sufficient number of guards to take care of the number of prisoners that were employed on the work, and who, if Phalen's testimony is correct, could have been working without a guard seeing them at the time.

It must be borne in mind that this was known as an armed camp, and that prisoners with long-term records, and of a

vicious nature, were amongst those employed at this particular work and consequently there was a higher duty devolving upon the state agency involved than would be present or required in an unarmed camp. The record shows that Phalen himself was armed with a shotgun at the time.

The witness Blake, one of the witnesses for the state agency, when asked the question (record p. 112), "Can you explain how, if a guard had been on the alert three men could have gone to one end or the other of the quarry without being seen," replied, "It looks to me like he could have seen them all right." Further in this connection the witness Montgomery, who was in charge of the guard, states (record p. 22) that it was the duty of the guard to keep the prisoners in view at all times. If this was the duty of the guard Phalen then he definitely violated that duty, because he has testified (record pp. 76-77) that he could not see the men behind the truck.

It is difficult to comprehend that a watchful guard could not have prevented the escape when, as he testified, he could not have been more than thirty feet away from the prisoners themselves, and they, the prisoners, could not have been more than that distance in front of him, the guard. (Record p. 76.) Either the guard was negligent in not noticing the escaping prisoners or the circumstances were such that, considering the nature of the men who were employed in this work, the state agency involved ought, beyond all question, to have employed more guards in carrying on the work. In either event it seems to me that in equity and good conscience the state should be liable for any act committed by an escaping prisoner that deprives a citizen of his right of property or who by reason of the vicious act of an escaping prisoner is so maimed as to be made a cripple for life and deprived of the means of earning his livelihood.

The project of improving our highways, under the system and plan adopted, must be commended, not only from an economic but from a social standpoint as well. The work done by reason of this plan saves many dollars for the state in bringing

about necessary improvements and at the same time perhaps creates a more humane manner of handling prisoners and at least, gives the prisoner who wants to be reformed an opportunity to do so in the open without being confined within the gloom of four walls. This very scheme and plan, however, carries with it certain responsibilities and obligations that must be fully discharged by the state. One of these is that in view of the very nature of the work that is carried on and the prisoners involved, the state is under obligation, at least in equity and good conscience, to protect the citizen, as well as his property, from any tort or criminal act that might be committed against him or his property by reason of the presence of these prisoners. Within reason the state must take the required and necessary precautions. It must have a sufficient number of guards, in an armed camp especially, to take every precaution to avoid escapes. It must see to it that capable, keen and alert guards are placed in charge of the work, and failing to carry out these conditions, it ought to be, in my opinion, held liable for any harm that was done to a citizen by an escaped prisoner when these requirements have not been met by the state itself.

At the close of the third to the last paragraph of the majority opinion there is this significant statement: "The guard could not reasonably have seen the men behind the truck." Let me ask, if not, why not? I repeat, in view of this statement, either the guard was not keen and alert or a sufficient number of guards had not been supplied. In either case there was negligence which ultimately led to the deplorable and tragic injury to claimant.

Joe Yoho, safety director for the state road commission, of the district involved, who made an independent investigation of this whole affair, when asked (record p. 148) whether or not Carl F. Montgomery, who also testified, and who was the chief of the guard, had made a statement to Yoho to the effect that Phalen had been discharged for negligence, answered "Yes, Sir. He made this quotation: that he discharged guard Phalen for negligent—for negligence on line of duty relative to that escape." This statement was afterward denied by Montgomery himself, but the fact remains, as shown on record page 165, that Mont-

gomery, the captain, told Phalen that he would not need him on the morning of May 13, 1944, which was a week or ten days after the escape in question had taken place, and so far as this record reveals Phalen has not been employed or engaged as a guard since, and it is questionable whether or not he has any connection with the department at the present time. The witness Montgomery further testifies (record pp. 165-166) that he wanted to talk to Phalen about matters of the escape but never had an opportunity as Phalen went to his home at Cass, West Virginia, to spend a two weeks' vacation, but he has never returned to the job as a guard. So far as the record reveals he never returned to that particular work nor is it definitely shown whether he was discharged or not or whether he was in fact acquitted of any negligent conduct in watching over the men at the quarry. All of which indicates to me rather strongly that at least to the officials in charge of the project the acts of Phalen as the quard in question were not those of a careful, prudent man, and that he should not be continued in that line of work. After the escape of the three men in question on May 3rd, he, Phalen, allowed another man to escape also.

Under all these circumstances I would make a substantial award to claimant to recompense him, to a degree, at least, for the irreparable injury he has suffered.

(No. 419—Claim denied)

ATHEY-BROOKS MOTORS, INC., Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 2, 1945

An award will be refused a claimant to whom two courses of conduct are open in the operation of a vehicle on a public road and who did not exercise ordinary care in choosing the course to pursue and thereby sustained property loss.

Appearances:

Robert McDougle, for claimant;

W. Bryan Spillers, Assistant Attorney General, for respondent.

G. H. A. KUNST, JUDGE.

On July 13, 1944, about two-thirty o'clock P. M., the sun shining and good visibility, claimant's common-carrier truck and trailer, eleven feet two inches high, duly licensed under state law, being driven north, in passing a streetcar on Murdock avenue, under the jurisdiction of respondent, in the city of Parkersburg, West Virginia, struck the limb of a tree extending out over the street and caused damage to the trailer amounting to $668.25 for which an award is asked.

The evidence shows: That respondent had exercised jurisdiction over this street only a short time; had no notification of the existence of this limb; no former similar accidents had occurred here to the knowledge of any witness; the scars on the limb were not shown to be due to any previous collision, with trailers, as assumed by brief of claimant; claimant had been operating trucks over this street for a period of approximately

fourteen years; the driver of this vehicle was familiar with this street and the conditions pertaining to driving vehicles over it and had driven trucks over it about twelve times; he had been warned of danger incident to lack of clearance and instructed to be alert and exercise care concerning same (which was his duty without instruction); there was clear vision for a long distance; the dimensions of his vehicle were known to him, its height and the amount of clearance needed to avoid an obstruction; the distance from the streetcar rail to the east curb of street was one hundred and forty-seven inches; the roof of streetcar extended over the rail approximately twenty inches; the trailer was ninety-four inches wide and the vehicle, including the tractor and trailer, was thirty-three feet in length; the distance from the street curb necessary to clear limb of the tree was twenty-seven inches; the sway of the streetcar was from four to six inches; adding extension of streetcar over rail, twenty inches, width of trailer, ninety-four inches, distance to curb for clearance of limb, twenty-seven inches, made a total of one hundred and forty-one inches and left a space of six inches; adding the sway of the streetcar, there was left no extra space between the streetcar, the trailer and the clearance of the limb. The approaching streetcar and the limb were both visible long before passage would take place. The speed of his vehicle was ten miles an hour or less.

A choice of two courses of conduct were open to the driver; his duty was to exercise ordinary care in choosing which course to pursue. One course was safe, offering no hazard whatever, by stopping.

The other course was driving his vehicle, thirty-three feet in length, between a swaying streetcar, through a passage way having an extra width of only six inches, or no extra width, by reason of the swaying streetcar.

Ordinary, reasonable care is such as is commensurate with apparent danger. This court is of opinion that the driver of this vehicle did not exercise such care in choosing the latter course of conduct: 45 C. J. 961, section 516.

An award is denied and the case dismissed.

(No. 383—Claim denied)

THE QUEEN INSURANCE COMPANY OF AMERICA, and THERESA BRINDIS, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed February 2, 1945

When upon the hearing of a claim asserted against the state the evidence is conflicting but preponderates in favor of the agency involved, an award will be denied.

J. Walter Copley and Thomas West, for claimants;

W. Bryan Spillers, Assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

On January 8, 1944 a collision occurred in the town of Wayne in Wayne county, West Virginia, on state route No. 52 between a 1941 Chevrolet 1½-ton truck belonging to claimant Theresa Brindis and a truck belonging to the state road commission. The former was repaired by the Price Motor Company of Williamson at a cost of $243.43. Said claimant Theresa Brindis carried collision insurance on said truck with the Queen Insurance Company of America. The policy contained a $100.00 deductible clause. The insurance company paid to her the sum of $131.43. The Queen Insurance Company of America joins with claimant Theresa Brindis in this case and cotends that it should be repaid said sum of $131.43 while claimant Brindis seeks an award of $112.00, $12.00 of said amount representing a towing charge that was paid by her in addition to the amount paid by the insurance company.

In the early morning of the above date Thomas Brindis, a fruit merchant of Williamson, West Virginia, driving the truck owned by his wife, claimant Theresa Brindis, left that city en-

route for Huntington, in said state. As he passed through the town of Wayne, the county seat of Wayne county, about sixty miles distant from Williamson, the truck he was driving and a state road commission truck, driven by Charles Bradshaw, collided.

In addition to the driver Brindis there were two other occupants of the truck when the accident occurred, namely Roy Temper and a soldier now in France. Said Thomas Brindis and Roy Temper testified in support of the claims.

Brindis stated that the accident occurred as he came up toward the courthouse as he was coming out of a curve in the road, practically a horseshoe curve. According to his testimony he was going around this curve. He said: "Just about the time we straightened up to go up the hill is where we hit." The state truck was approaching from the opposite direction. Brindis was driving uphill and the state truck was coming downhill. Brindis was driving between five and seven miles an hour. The road was slippery that morning. As he was straightening out of the curve he met the other truck. When he first saw it it was from twenty to thirty feet away. He said that when he perceived the state truck he stopped and got over as far as he could on the road and that he was on his side of the road. The state truck was not traveling very fast. After the collision there might have been about five or six feet separating the two vehicles, that is, the front of each truck. And his truck was still on his side of the road. It was off the road, on his side, as far as he could get, and the state truck was setting back about in the middle of the highway. A bank and a ditch prevented Brindis from getting any farther than the position occupied by his truck.

The accident was investigated by a member of the department of public safety who made measurements of the positions of the two trucks. A deputy sheriff of Wayne county also assisted in investigating the accident. When Brindis saw the state truck approaching, he said he "put the brakes on. It didn't take long to stop because we were going slow." The driver of the state truck applied his brakes about the same time he saw Brindis.

Brindis admits that the road was very slippery and that there was snow and ice on it. He had chains in the truck but was not using them.

The witness Temper testified in substantial corroboration of the evidence given by Brindis. He said there was plenty of room on the road for two trucks to get through.

Upon the testimony of these two witnesses claimants rest their case.

There is a sharp conflict in the testimony offered by the claimants in support of the claims and the testimony adduced by the state in opposition to the claims.

It is shown by the testimony of Charles Bradshaw, a grader operator and truck driver for the road commission, who drove the state truck at the time of the accident, that the road had been slick and slippery the night before and that on the morning of the accident an assistant supervisor had directed him and other employees to obtain a truck and get cinders and place them on the hill, where vehicles had been "hung up." He did so. Two other employees were in the truck with him. The road was slippery and it was snowing. He testified: "When I started around that curve, this truck come out of that curve, just along about the point of that curve there, and when he swung out he swung out on my side of the road. I didn't see him until we was within twenty or thirty feet of one another. I put my brakes on. It was slick and I had chains on my car, but the road was pretty slick and icy." Witness was driving on his side of the road. Brindis was on his side of the road, but when he swung around the curve he swung the front end of his vehicle on Bradshaw's side of the road. When the collision occurred the front end of the Brindis truck was over on the Bradshaw side of the highway. The road at the point where the accident occurred was 18 feet in width. On the side on which Bradshaw was driving the shoulder was two and one-half feet in width and on the side that Brindis was driving the shoulder was three feet in width. It was a brick road, but since the occurrence

of the accident has been widened and has a black top surface on it at this time. The front end of the Brindis car was over the center or white line of the road. This fact was discovered after the collision occurred.

Ira Elliott, a witness for the state who was in the car operated by Bradshaw, testified that when they went to obtain gravel or cinders for the road they found a few cars hung up on the hill. He heard Roy Lockhart, also an occupant of the truck exclaim when he saw the Brindis truck approaching, "Look out Charlie!" The trucks were just ready to jam at that time. This witness also testified that the road was wide enough for two cars to pass if both stayed on the proper side of the road. When the accident happened it was snowing pretty hard and the highway was slick. The front end of the state truck was turned to the right side of the road. There were chains on the rear wheels of the state truck.

Roy Lockhart, one of the occupants of the state truck, testified that the road was "awful slick." He further testified that he warned Bradshaw, the driver of the state truck, to look out and about that time the two trucks collided. He saw the Brindis car approaching and for that reason warned the driver of the state truck. He declared that the front end of the Brindis vehicle was over some from the middle of the road. There was snow and ice on the road and the state truck was on its proper side.

Andrew Barbour, a deputy sheriff of Wayne county, called as a witness for the state, testified that he made an investigation of the accident and assisted Trooper Langford in making measurements of the positions of the two trucks. He stated that the state truck had chains on and that the Brindis truck did not. The Brindis truck, he declared, was more on the state truck's side of the road than on its own side. The front end of the Brindis truck was over on the state truck's side of the road. The only track marks that could be seen were those of the Brindis truck. The witness also said that it was snowing as hard as he had ever seen it snow.

When upon the hearing of a claim asserted against the state the evidence is conflicting but preponderates in favor of the agency involved, an award will be denied.

An award will be denied in each case and the claims dismissed.

(No. 404—Claim denied)

THE STATE CONSTRUCTION COMPANY,
a corporation, Claimant,

v.

STATE TAX DEPARTMENT, Respondent.

Opinion filed February 2, 1945

An award will not be made to a person failing to file application for refund of taxes paid on gasoline within sixty days after date of purchase or delivery of gasoline as provided by general law, when it appears from the general law that it is the policy of the Legislature to deny payment of such refunds unless such application is filed as prescribed by the statute permitting refunds on gasoline used for certain specific purposes.

Robinson & Stump, for claimant;

W. Bryan Spillers, Assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

In this case the State Construction Company claims from the state of West Virginia the sum of $3008.90 on account of state tax paid on fuel oil and gasoline used in the operation of a Lorain 75 shovel and tractors in connection with a coal stripping operation in Harrison county, West Virginia. This gasoline and fuel oil was used over the period of time beginning in August, 1943, and extendng through June, 1944. The amount

of refund claimed to be due the claimant for each month is as follows:

August, 1943	$ 83.75
September, 1943	273.75
October, 1943	247.50
Novemebr, 1943	169.00
December, 1943	286.75
January, 1944	281.50
February, 1944	353.00
March, 1944	355.00
April, 1944	282.00
May, 1944	381.50
June, 1944	295.15
	$3008.90

Separate applications covering the refund for each of the above listed months were filed in the office of the state tax commissioner on September 13, 1944. On September 15, 1944 each of said applications was rejected by the state tax commissioner for the reason "gasoline was purchased more than 60 days prior to date of filing application and refund can not be legally granted."

It is contended by claimant that failure to file the several applications for refund was occasioned by excusable inadvertence and that the state has been unjustly enriched to the extent of said sum of $3008.90 at the expense of said State Construction Company.

In the carefully considered case of *Del Balso Construction Corporation* v. *State Tax Commissioner*, 1 Court of Claims (W. Va.) 15, we held:

> "An award will not be made to a person failing to file application for refund of taxes paid on gasoline within sixty days after date of purchase or delivery of gasoline as provided by general law, when it appears from the general law that it is the policy of the Legislature to deny payment of such refunds unless such application is filed as prescribed by the statute permitting refunds on gasoline used for certain specific purposes."

In the more recent cases of *Joseph Harvey Long, Paul Walker Long, Jenny Eloise Long,* and *Hilda S. Long* v. *State Tax Commissioner,* in which determinations were made at the present term of this court, we held:

> "The Court of Claims is without jurisdiction to extend the time fixed by statute to make application for refund of excess income tax paid. Such income taxpayer is obliged to avail himself of the remedy provided by law for relief."

The time fixed by statute in which to make application for refunds is perhaps too short, but that is a matter for the Legislature to consider and determine.

We feel that the case under consideration is controlled by our holding in the above cited cases, and are, therefore, constrained to deny the award sought and dismiss the claim.

(No. 465-S—Claimant awarded $24.38)

HAZEL M. SHAFER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 12, 1945

G. H. A. KUNST, JUDGE.

On January 15, 1945, at Adamston, Harrison county, West Virginia, on U. S. route No. 19, driver of respondent's truck No. 430-87, while ascending a grade, attempted to shift gears which failed to mesh. The truck drifted back and collided with claimant's automobile causing damage to the car, which cost $24.38 to repair, for which amount claim is made.

Respondent recommends and the attorney general approves its payment.

An award of twenty-four dollars and thirty-eight cents ($24.38) is made to claimant.

(No. 461-S—Claimant awarded $591.00)

MILDRED JOHNSON, an infant, whose claim is filed by HOWARD E. JOHNSON, her father and next friend, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 12, 1945

G. H. A. KUNST, JUDGE.

On August 4, 1943, while Mildred Johnson, the eleven year old daughter of claimant, was playing at the side of Sixth street, Point Pleasant, Mason county, West Virginia, respondent's truck No. 130-95 passed, loaded with cribbing ties, not held by binder chains as required by law. A tie fell from the truck on the child's right foot causing injury, pain and suffering, which necessitated surgery and hospitalization, for which claim is made for $591.00.

Respondent recommends and the attorney general approves its payment.

An award for five hundred and ninety-one dollars ($591.00) is made to claimant. It is recommended that this sum be paid to a guardian appointed for claimant by the proper court, upon the giving of a bond in an amount sufficient to cover the award and the execution of a full and complete release to be signed by the father and the guardian, showing payment in full settlement of any and all damages that may have resulted by reason of the injury in question.

(No. 466-S—Claimant awarded $29.64)

HARRY E. DAVIS, Claimant,

v.

STATE CONSERVATION COMMISSION, Respondent.

Opinion filed July 12, 1945

G. H. A. KUNST, JUDGE.

On January 17, 1945, on U. S. highway No. 119, at Five Block, near Sharples, West Virginia, claimant's automobile collided with a fallen telephone pole, rotted at the ground and broken by a heavy fall of snow, which extended into the road. It was a pole in a telephone line leading to a fire tower both belonging to respondent and which it had negligently failed to remove. The cost of repairing the resultant damage to the car was $29.64, for which claim is made.

Respondent having recommended and the attorney general having approved its payment an award of twenty-nine dollars and sixty-four cents ($29.64) is made to claimant.

(No. 470-S—Claimant awarded $40.75)

MAIN STREET NEWS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 12, 1945

CHARLES J. SCHUCK, JUDGE.

Claimant, having or owning a store or place of business at 327 West Main street in the city of Clarksburg, West Virginia, asserts its claim against the state road commission for damages

in the amount of $40.75 resulting from having a plate glass window broken, which said window was located in the said storeroom at the said address, the window having been shattered and broken by loose stones flying or being propelled against the said window by passing automobiles. It is alleged that the said stones were negligently left on the highway in front of claimant's place of business by the said state road commission at the time that changes or repairs were being made to the said highway during the month of February, 1943. The facts and circumstances surrounding this particular claim are similar in all respects to those that governed this court in its decision heretofore made in the case of *Darling Shops, Inc.* v. *State Road Commission,* 2 Ct. Claims (W. Va.) 397, and in which we held the state road commission liable for the damages sustained by the said Darling Shops, Inc. Accordingly we are of the opinion that the state is morally bound to compensate the claimant for the damages suffered by reason of the said negligence.

Recommendation of payment is made by the state road commission and concurred in by the attorney general's office. Under all the facts and circumstances as shown we are of the opinion that claimant is entitled to recover and an award is made accordingly in the sum of forty dollars and seventy-five cents ($40.75).

(No. 460-S—Claimant awarded $200.00)

WILLIAM H. NEAL, JR., Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 12, 1945

CHARLES J. SCHUCK, JUDGE.

Claimant asks recovery for damages to his Chevrolet car, resulting from the said car or automobile being struck by state

road truck 130-96, on the road near Leon, Mason county, West Virginia, on the 14th day of April, 1943.

From the record as submitted for our consideration it appears that claimant's car was parked at the side of said road and that the state road truck in question, by reason of a defective hydraulic brake line bursting, got beyond the control of the driver thereof and could not be stopped in time to prevent the truck from colliding with claimant's car and causing the damages in question.

The state road commission recommends payment of the damages in the sum of $200.00 and the assistant attorney general approves the payment of the said amount.

Under all the circumstances and conditions as presented we are of the opinion, and so hold, that the state is morally bound to compensate the claimant for the damages caused by the collision in question, and make an award in the sum of two hundred dollars ($200.00) in favor of the claimant, William H. Neal, Jr.

(No. 463-S—Claimant awarded $123.44)

FRANCIS RONK, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 12, 1945

CHARLES J. SCHUCK, JUDGE.

Claimant seeks recovery for damages to his taxicab in the amount of $123.44, occasioned by a collision between the said taxicab and state truck 230-46, the collision having taken place on state route No. 9, at Mill Creek, near Milton, West Virginia, on September 11, 1944.

From the record as submitted for our consideration it appears that the accident was caused by the negligence of the driver of the said state truck in not using proper warning signals of his intention to back across the highway, and in so doing backed or ran his truck into claimant's taxicab which was passing on its right and proper side at the time of the collision.

Payment of the damage in the aforesaid amount is recommended by the state road commission and approved by the assistant attorney general. Accordingly an award is made in favor of the claimant, Francis Ronk, in the sum of one hundred twety-three dollars and forty-four cents ($123.44).

(No. 471-S—Claimant awarded $30.60)

LUI PAPPALARDO, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 12, 1945

ROBERT L. BLAND, JUDGE.

Upon the facts disclosed in the record of this case, prepared by the state road commission, and filed with the clerk of this court on March 20, 1945, the head of the state agency concerned concurs in the claim asserted by claimant for the sum of $30.60, and an assistant attorney general approves the claim as one for which, within the meaning of the court act, an appropriation should be made by the Legislature. From these facts it appears that on December 26, 1943, claimant's automobile was parked diagonally across a state controlled road in Wetzel county, West Virginia, about eleven o'clock in the morning. The rear end of the vehicle was in a ditch, while the front was toward the center of the road. The driver of

state road commission truck P-30-70 entered a sharp turn on the brow of a hill when his truck began to slide. As the vehicle swung around claimant's car its rear end collided with claimant's machine causing damage thereto. This damage is fixed at $30.60. Respondent says that the accident was the fault of the state. It is shown that claimant is entitled to be compensated.

An award is, therefore, made in favor of claimant, Lui Pappalardo, for thirty dollars and sixty cents ($30.60).

(No. 439—Claim dismissed)

JAMES DILLON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 16, 1945

By paragraph 2, section 14, of the court act, it is expressly provided that the jurisdiction of the Court of Claims shall not extend to any injury to or death of an inmate of a state penal institution.

Claimant, appears in his own behalf.

W. Bryan Spillers, Assistant Attorney General, for respondent.

CHARLES J. SCHUCK, JUDGE.

Claimant, James Dillon, was a convict located at state road prison camp No. 75, at Keyser, West Virginia, where on March 19, 1942, he lost the sight of his left eye which was struck by a flying piece of stone while he was knapping rock, no goggles having been furnished him by respondent or anyone in charge of the camp. He seeks compensation for his injury.

While his claim may be meritorious, yet this court has held in *Baisden* v. *State Road Commission*, 2 Ct. Claims (W. Va.) 352 that by the provisions of the act creating the court, paragraph 2, section 14, it is expressly provided that the jurisdiction of the Court of Claims shall not extend to any injury to or death of an inmate of a state penal institution. Claimant in our opinion was an inmate of a state penal institution although working in the prison camp.

Accordingly we hold in accordance with the opinion in *Baisden supra* that the court is without jurisdiction and the claim is hereby dismissed.

(No. 459—Claim dismissed)

WILLIAM E. SNEE, Claimant,

v.

STATE TAX COMMISSIONER, Respondent.

Opinion filed July 16, 1945

An award will not be made to a person failing to file application for refund of taxes paid on gasoline within sixty days after date of purchase or delivery of gasoline, as provided by general law, when it appears from the general law that it is the policy of the Legislature to deny payment of such refunds unless such application is filed as prescribed by the statute permitting refunds on gasoline used for certain specific purposes.

Claimant, on his own behalf;

W. Bryan Spillers, Assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

Claimant, a resident of Pennsylvania, engaged in the drilling of wells for the production of oil and gas, seeks in this pro-

ceeding an award for the sum of $578.35 for refund of gasoline tax paid on 11,567 gallons of gasoline purchased between June 3, 1944 and October 8, 1944, while drilling a gas well at Sisler, near Terra Alta, in Preston county, West Virginia, not used on highway. His petition for such refund was filed in this court on February 2, 1945, from which it appears that he did not make application to the state tax commissioner for refund until January 12, 1945, more than sixty days after purchase, on which account refund was not made to him by that department.

In the case of *Del Balso Construction Company* v. *State Tax Commissioner*, 1 Ct. Claims (W. Va.) 15, we held as follows:

> "An award will not be made to a person failing to file application for refund of taxes paid on gasoline within sixty days after date of purchase or delivery of gasoline as provided by general law, when it appears from the general law that it is the policy of the Legislature to deny payment of such refunds unless such application is filed as prescribed by the statute permitting refunds on gasoline used for certain specific purposes."

Such holding was followed *in re* claim No. 404, *State Construction Company* v. *State Tax Commissioner*, in which case an opinion was filed February 2, 1945.

In re claim No. 324, *Joseph Harvey Long et als* v. *State Tax Commissioner*, we held:

> "The Court of Claims is without jurisdiction to extend the time fixed by statute to make application for refund of excess income tax paid. Such income taxpayer is obliged to avail himself of the remedy provided by law for relief."

When preparing the docket for hearing of claims at the present term of this court it was ascertained and so held that the instant claim was not *prima facie* within its jurisdiction, and therefore the court declined to place it upon the trial calendar.

(Nos. 467, 468, 469—Claimants awarded $500.00; $2,000.00; $300.00)

A. W. UTTERBACK, MRS. A. W. UTTERBACK and FRANCES CREMEANS, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 23, 1945

The Court of Claims will recommend to the Legislature appropriations for the payment of damages for property loss and personal injuries suffered when it is disclosed by the record of claims asserted against the state that there is a moral obligation on the part of the state to make such payments and in equity and good conscience it should do so.

Lilly and *Lilly*, for claimants;

W. Bryan Spillers and *Ralph M. Hiner*, Assistant Attorneys General, for respondent.

ROBERT L. BLAND, JUGDE.

These three cases grow out of an accident which occurred on the 20th of March, 1944, at the intersection of Ninth avenue (state route 52) and Fifth street, in the city of Huntington, West Virginia. Since they involve the same basic facts, so far as the accident is concerned, they are, for prudential reasons, consolidated and heard together. The awards sought are as follows: Claimant A. W. Utterback, $1,500.00; claimant Mrs. A. W. Utterback, $15,000.00, and claimant Frances Cremeans, $1,500.00.

Claimant A. W. Utterback, now an Ensign in the United States Naval Reserve, was, for four years prior to his enlistment, engaged in the insurance business in said city of Huntington, having been superintendent of the National Life and Accident Insurance Company. He was paid in that capacity a stated salary and also received the benefit of certain commissions.

About six o'clock on the evening of the twentieth day of March, 1944, accompanied by his wife, claimant Mrs. A. W. Utterback, and son, two years of age, and his sister, claimant Frances Cremeans, Ensign Utterback was driving his 1941 model special Deluxe Chevrolet automobile in a westerly direction on Ninth avenue (state route 52). He and his wife occupied the front seat, while Mrs. Cremeans and the child sat in the back seat. At the intersection of Ninth avenue and Fifth street the Utterback car, which was being driven at a speed of from fifteen to eighteen miles per hour, and a Plymouth coupe automobile, owned by the state road commission and driven by C. E. Tauszky, junior engineer for the road commission, collided. The Utterback car was very badly damaged. Ensign Utterback sustained some slight bruises about the face and body; Mrs. Utterback was very seriously hurt. Her right eye was badly cut in three places and the side of her right cheek was disfigured. Below the right eye there was a lump as big as a hen's egg. In addition she suffered great nervous shock and experienced much pain. Several hundred dollars were expended for medical and surgical attention, plastic surgery having been resorted to to repair the disfigurement of her face. Hospital residence and medical treatment necessitated the expenditure of large sums of money on her behalf. Claimant Frances Cremeans was hurt about her limbs and body and found it necessary to be placed in a hospital for forty-two days, incurring expenditures incident to her injuries.

There is a marked conflict in the testimony submitted to this court, but physical facts surrounding the accident tell us much. Ninth avenue is an extensively used thoroughfare. At the point of its intersection with Fifth street there are no stop signs. The driver of the state car testified that he was not going more than ten miles an hour, which speed was as indicated by his own testimony, materially increased immediately before the accident as the impact of the collision and the relative position of the cars afterward would indicate. His car was found fifty-five feet back on Fifth street where it had run into a maple tree. He admitted that he knew of the existence of the two stop signs on Fifth street, and notwithstanding such knowledge he

did not stop in obedience to the traffic rules of the city. Ensign Utterback testified that just before entering the intersection he noticed the state car approaching on Fifth street back near the center of the block but that since he did not have any stop sign he paid no further attention to the car because he had the right of way. This was true, and it was the plain duty of the driver of the state car to have stopped his vehicle before entering the intersection. The accident was wholly uncalled for and could readily have been avoided by the exercise of ordinary judgment and the observance of the traffic signs of warning. It is fortunate that the occupants of the Utterback car escaped with their lives.

We do not believe that any good or necessary purpose would be subserved by entering into a more detailed discussion of the facts and circumstances surrounding the accident. Suffice it to say that the court made careful and thorough investigation of these facts and circumstances, and its members are unanimously of opinion that the claims filed in the three several cases are just and meritorious. It is believed that under the peculiar situation, bearing in mind the manner in which the state car was driven and the indifference shown to the stop signs by the agent of the state in charge of it and the dire consequences resulting from the accident, there is a moral obligation on the part of the state to make reparation for the property loss sustained and personal injuries suffered by the claimants. Both equity and good conscience would justify and warrant the Legislature in making an appropriation for the payment of the awards hereinafter made.

An award is, therefore, made in favor of claimant A. W. Utterback in the sum of five hundred dollars ($500.00), the major portion of which will reimburse him for the outlay made for the repair of his automobile and the residue to compensate him for the time necessarily lost from his business; and an award is made to claimant Mrs. A. W. Utterback in the sum of two thousand dollars ($2,000.00), which amount includes reimbursement for moneys necessarily expended to repair the damage done to her face, and makes a reasonable allowance for pain and suffering experienced; and to claimant Frances Cremeans an award is made in the sum of three hundred dollars ($300.00).

(No. 476—Claimant awarded $3,000.00 upon rehearing)

WARD HUFFMAN, guardian of BOBBY L. COGAR, an infant, Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed August 29, 1945

Opinion on rehearing filed December 17, 1945

Wysong & Wysong, for claimant:

W. Bryan Spillers and *Ralph M. Hiner*, Assistant Attorneys General, for respondent.

ROBERT L. BLAND, JUDGE:

In my opinion the Court of Claims cannot make an award on the sole ground of sympathy, however strong the appeal may be. It is without power to recommend to the Legislature an appropriation of the public revenues as a gratuity. The rule of equity and good conscience cannot be invoked for such purpose.

Bobby Cogar, fourteen years of age, on whose behalf a petition is filed in this case by his duly appointed and acting guardian, seeking an award of $10,000.00 as compensation to his said ward for personal injuries sustained while he was an inmate of the West Virginia children's home at Elkins, is the son of Mr. and Mrs. Ellery Cogar, late residents of Webster county, and both now deceased. The father of said infant was a veteran of World War I. By virtue of that fact his children and dependents became entitled to an allowance of funds from and at the hands of the veterans' administration, West Virginia facility. On the death of both the father and mother of said ward, the duty rested upon said facility to pay said money to the dependents of said deceased veteran, including petitioner's

ward. At the time of the appointment of petitioner as guardian for said infant son of said deceased veteran, his ward was in charge of the department of public assistance, children's division, of West Virginia, and was being kept and cared for in the home of Al Lanham, of Camden-on-Gauley, West Virginia. The appointment of petitioner as guardian for said infant was made at the instance of the Veterans' Administration. The department of public assistance subsequently caused the boy to be removed to the children's home at Elkins. He was removed to that institution in September, 1943. The boy was required to attend the school taught at the home and did minor chores from time to time. The twenty-eighth day of December, 1943, was observed as a holiday. On that date petitioner's ward effected an entrance to the basement of a building through which he made his way to the laundry. The laundry work had just been concluded by Mrs. Hazel Collett, the laundress at the institution. She had momentarily left the laundry. Only a young female inmate was present when the boy made his appearance. The current of a drying machine, known as a "spinner" had been turned off. The spinner, however, continued in motion for a short time thereafter. The boy walked to this spinner and deliberately thrust his hand into it. The top had not at the moment been replaced when the current was shut off. He gave as a reason for his action that he saw a nut in the machine and wanted to see what it looked like. He further added "Well, I was fooling around the furnace and I just went in there and I was fooling around and went in there and stuck my hand in the thing." As a result of his inquisitiveness his arm was severed and dropped into the spinner. He was given first aid by the superintendent of the institution and his wife, and immediately conveyed to the Davis Memorial hospital where his right arm was amputated close to the socket. There can be no doubt that the child was badly and seriously injured. His case is one that makes an exceedingly strong appeal to the sympathy of the court. The claim is prosecuted solely on the alleged ground of the negligence of the officers and agents of the institution. The claim is advanced that the machine was a dangerous instrumentality and that the duty rested upon

those in charge of it to protect the inmates from accident and harm. The state resists an award in the case. It is shown by the testimony of Mrs. Collett, the laundress, that children were warned against danger and forbidden to go to the laundry except when they were sent for the purpose of bathing and carrying laundry. On the day of the accident the boy had no occasion to be in the laundry. He effected entrance clandestinely and the accident occurred immediately after he entered the room and while the laundress was absent for approximately five minutes on an essential mission. There is no evidence in the case on which majority members can see their way clear to recommend relief for the child. To say, under the facts disclosed by the record, that the officials, agents and servants of the institution were negligent in the premises would be a violent assumption. I am impressed by the fact that all ordinary precautions against danger to the child, as well as to other inmates of the institution, were employed. The machine is not shown to be an inherently dangerous instrumentality. I do not believe that an appropriation of the public revenues of the state would be proper under the circumstances disclosed by the evidence in this case. Such an appropriation would amount to nothing more than the bestowal of a gratuity, and it would establish an unfortunate precedent. The public revenues cannot properly be appropriated for private purposes. An appropriation to compensate petitioner's ward would, I think, be for a private purpose. An award is therefore denied and the claim dismissed.

G. H. A. KUNST, JUDGE, concurring in part, dissenting in part.

I concur with Judge Bland in his opinion that there be no award granted in this case because I am of the opinion that this court had no jurisdiction of the case.

This claim arose out of the care or treatment of Bobby L. Coger, an inmate of the West Virginia children's home, a state institution, under the control and jurisdiction of the state board of control, respondent herein. By reason of the alleged negli-

gence of its officers, employees and servants in not rendering to him the *care or treatment* which its duty under the circumstances, as custodian of such inmate who had not yet reached the age of discretion, legally required of it, but, on the contrary, this ward of the state while in said institution was exposed to a dangerous instrumentality, a spinner, not properly guarded and concerning which he had not been sufficiently warned and instructed as to its dangerous character and by which his arm was torn off and for which injury and suffering, an award of $10,000.00 is asked against said respondent.

The third provision of sec. 14, art. 2 of ch. 39 of the Acts of the West Virginia Legislature for the year 1945 says:

> "The jurisdiction of the court of claims shall not extend to any claim . . . Arising out of the care or treatment of a person in a state institution."

Care is definied as "a relative term and of broad comprehension, meaning responsibility; charge or oversight; watchful regard and attention." Courts have said that the distinction of different degrees of care "is unscientific and impracticable, as the law furnishes no definition of these terms that can be applied in practice." 9 C. J. 1287 and 1288.

Treat is defined: "to conduct one's self in a certain manner with respect to; use; as, 'to treat a horse cruelly.' " Treatment is defined as the act or manner of treating in any sense. "I speak this with an eye to those *cruel treatments* which men of all sides are apt to give the characters of those who do not agree with them. Addison-Spectator No. 243, Century Dictionary. (Italics ours).

Failure to bestow upon a person in a state institution the degree of care which the situation demands constitutes treatment out of which a claim may arise.

The phrase, *care or treatment*, has received judicial interpretation in an English case: "*Care or treatment* of any lunatic." (Italics ours).

"The parents of a lunatic who resides with them under their care are persons 'having the care or charge' of a lunatic within the meaning of 16 & 17 Vict. C 96 S 9 and may be convicted under that section for *ill-treating* such lunatic." *Buchanan and Another, Appellants* v. *Hardy, Respondent*. Vol. 18, Q. B. D. pp. 486 and 487. (Italics ours).

Lord Coloridge C. J.: "I am of opinion that this conviction must be affirmed. The justices have found that the appellants did *ill-treat* the lunatic, who was their daughter and under their care, it had been argued that, notwithstanding those findings, the persons charged with *ill-treating* this lunatic are not liable under 16 & 17 Vict. c. 96. S. 9, because they are the parents of the lunatic. That section enacts that if 'any person detaining or taking or having the care or charge, or concerned or taking part in the custody *care or treatment* of any lunatic or person alleged to be a lunatic, in any way abuse, ill-treat, or wilfully neglect such lunatic or alleged lunatic, he shall be guilty of a misdemeanor.' " *Id.* (Italics ours).

The *care or treatment* of a person in a state institution out of which a claim could arise is that degree of *care or treatment* which constitutes actionable negligence.

"Judge Cooley in his work on Torts, defines actionable negligence as 'the failure to observe, for the protection of the interests of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury,' and this definition has been adopted or quoted with approval in a large number of cases and characterized as the best definition " 45 C. J. 631 and cases cited.

No plea to the jurisdiction was filed herein by the attorney general, representing respondent, and this provision of the court act was overlooked and not considered by the court until after the case had been heard, and no conclusion was reached. The other members of the court were of opinion that the case having been heard on its merits a decision should be made thereon and opinions written.

If I am correct in my opinion, no award should be made and no opinions be rendered on the merits of this claim without having first determined the question of jurisdiction.

"Objection for want of jurisdiction of the subject matter may be taken by demurrer, or motion, or in any way whereby the subject may be brought to the court's attention, and if not brought to the attention of the trial court, may be noticed by the appellate court of its own motion for the first time." *Thacker* v. *Hubbard & Appleby*. 122 Va. 379; 94 S. E. 929; 21 A. L. R. 414n.

A motion to dismiss because the subject matter is not within the jurisdiction of the court is rightly entertained by the court.

"When it appears that the court has no jursdiction over the subject matter of the suit, it will take notice of the defect, whether objection is made or not, and will dismiss or stay the proceedings *ex mero motu*, and it is its duty to do so." . . . 12 Enc. of Pleading & Practice, 190.

It should be the duty of the court to carry out the intention and policy of the Legislature. Since the language of this statute is plan and unambiguous, there is no occasion for construction. Every technical rule, as to construction and force of particular terms, must yield to a clear expression of legislative will. The intention of the Legislature is clearly expressed in the clear unambiguous statement of the statute, which enactment could be stated: The jurisdiction of this court does not extend to a claim arising out of actionable negligence to a person in a state institution.

CHARLES J. SCHUCK, JUDGE, dissenting.

I cannot agree with the reasoning set forth in the majority opinion refusing an award, and I am therefore obliged to dissent.

While, of course, no appropriation by the Legislature can be made as a mere gratuity or on the sole ground of sympathy, but when the facts, carefully analyzed, show negligence and

carelessness on the part of those in charge of a state institution, then no question of mere gratuity is presented but rather the matter of doing justice in equity and good conscience as set forth in the act creating this court.

The testimony clearly shows that the machine in question was highly dangerous not only when it was being operated for the purpose for which it was constructed, namely taking care of and drying the washing of the laundry of the institution in question, but also, even after the work had been completed for which the machine was used and the electric current turned off it still continued to operate and was so dangerous that it amputated this boy's arm when for some reason he put his arm into the machine. The very happening of the accident and its nature in my judgment, demonstrates conclusively that it was a dangerous instrumentality or machine used in carrying on the work of the istitution. No precaution had been taken to keep the children away from the machine or its operation as the evidence reveals. No protection in or about the machine had been constructed or built for the purpose of protecting the children of the institution and so far as the evidence reveals, it was only after this deplorable accident had happened that any precautionary measures whatever were taken by those in charge of the institution.

I challenge the statement that all ordinary precautions against danger were taken. A careful reading of the record, I repeat, discloses that no precautionary measures were taken, save only that, since the accident, rules and regulations have been formulated not to allow any of the boys in the laundry room who are not employed there in taking care of the cleaning and drying of the laundry. So far as the record reveals, no rules had been promulgated before the accident. In fact, every inference and deduction shows that no precautions against injury to the children had been taken previous to that time. If this was not negligence, considering all of the circumstances and facts, namely that it was a state institution where children of tender ages were confined without the proper discretionary power to discriminate between what was or might be dangerous or

machinery that might be harmless, then I fail to comprehend how or under what conditions negligence or lack of proper or ordinary care could ever be imputed to those in charge of a like institution. As shown in the record (p. 40) the machine could have been operated when entirely enclosed and continued to operate, so far as the drying process is concerned when and if enclosed. In view of these facts the proper supervision was not maintained in my judgment in allowing the machine to operate without being closed and thus making it highly dangerous to any children that would enter the laundry room. That the claimant in question did enter the laundry room under the circumstances shown in the record was or ought to have been anticipated by the authorities in charge and as the record further shows, they have since endeavored to remedy this condition by keeping the door to the laundry locked and boys are now only allowed there when in charge of or under the supervision of one of the matrons or older employees.

The dangerous instrumentality of the spinner or machine in question is made manifest by the absolutely undisputed fact that although the power of the motor was no longer furnished by the electric current yet the uncovered and unguarded machine had power enough and sufficient to inflict this deplorable injury on a child of thirteen years of age. I am also of the opinion, as the facts reveal and as the claimant's personal appearance before the court will show, that while he was thirteen years of age, and therefore under the age with which he could be charged with contributory negligence so far as the legal rule was involved, yet, his mental development had been considerably retarded and was but that of a child of nine or ten years of age. These facts were or should have been known by those in charge of the institution.

The superintendent in charge at the time of the accident had been at the institution but a few days previous thereto and perhaps had not had time to fully acquaint himself with the various situations presented nor the hazard present in the using of the machine in question. He seems to have done what was necessary as a precautionary measure after the accident occurred;

but frankly admits that so far as he was able to learn and know no precautions were taken before the accident (record p. 35.)

In *Rine* v. *Morris et al.* 127 S. E. 908; 99 W. Va. 52, Judge Hatcher in the opinion says:

> "Where the defendants negligently leave exposed in a public place, unsecured, unguarded, and unattended, a dangerous machine, likely to attract children, excite their curiosity, and lead to their injury, while they are pursuing their childish instincts, a child of tender years, *injured by said machine while meddling with it*, is entitled to recover damages for the injury inflicted." (Italics ours).

Surely, the reasoning of Judge Hatcher in the case just referred to, has a most significant application to the facts presented by claimant.

The further question is presented by the supplemental opinion filed by Judge Kunst in which he agrees with the conclusion as set forth in the majority opinion, but concludes that the act creating the court, sec. 14, art. 2, of chap. 14, code, denies that the court has any jurisdiction to hear and try a claim arising out of the care and treatment of a person in a state institution.

I frankly admit that this provision is vague and indefinite as to whether or not it includes state institutions of every kind and description. If it does, then a student at the state university or any other state school who pays his tuition as well as room and board in case he occupies one of the dormitories, would be barred from presenting a claim to this court for injuries sustained while such student; and no matter how meritorious his claim may be or how extreme the negligence on the part of those in charge of the institution where the student had been injured, yet he would be denied the right to have his claim heard in this court on jurisdictional grounds. I cannot conceive that the Legislature intended such construction to be placed on the provision in question. I am of the opinion that it refers to penal and such other institutions in which the state is called upon to give aid and assistance, medical

and otherwise, and in which the state could not be held liable for the treatment of inmates by any in charge of the institution either through a mistake in the matter of treatment such as could easily happen in a state insane hospital or asylum or by the conduct of the guards or employees toward an inmate in any such institutions.

I would give to this provision a more liberal interpretation and would hold that in our state institutions and state schools, as well as where the state is charged with the duty of making and molding the lives of children and growing boys and girls into good citizens, that the duty of reasonable and ordinary care in their protection devolves upon the state under the circumstances and that the state should be liable when any of its officers or officials in charge are guilty of negligence and any of the students or inmates without fault, are injured thereby. I trust that at the next session of the Legislature this paricular provision will be clarified and the jurisdiction of this court in this respect definitely defined. For the reasons set forth, I dissent and would favor an award.

CHARLES J. SCHUCK, JUDGE, upon petition for rehearing.

A rehearing having been heretofore granted the claimant *in re* the above claim, and all of the facts adduced in the first or original hearing, as well as those presented at the second hearing, having been duly considered, and Judge Smith, sitting for the first time at the regular October term, 1945, agreeing with the views set forth in my dissenting opinion heretofore filed, and in which an award was recommended, and for the reasons set forth in the said opinion, an award is now made to the claimant in the sum of three thousand dollars ($3000.00); the said dissenting opinion hereby being adopted as the majority opinion of the court in the matter of said award; and we further recommend that payment be made accordingly in the said sum to the proper guardian duly appointed and qualified to care for the said infant's affairs and interests.

Judge Bland dissents and will file an opinion setting forth his views.

ROBERT L. BLAND, JUDGE, dissenting.

Upon careful reexamination of the record of this case and due consideration given to argument of counsel, I am constrained to adhere to the views which I expressed in a written opinion filed after the original hearing. Indeed, such views are strengthened and confirmed. It is not, in my opinion, a case in which an award may properly be made within the contemplation of the court act. I perceive nothing in the record that could possibly render either the board of control or the West Virginia children's home at Elkins culpable or in any way responsible for the accident sustained by Bobby Cogar. I do not see any actual negligence upon which an award could be based if an award may be made on that ground. It is well understood that the doctrine of *respondeat superior* does not apply to the state. The claim is prosecuted on the sole ground of negligence. The state is not liable for the negligence of its officers, agents or servants. In West Virginia no such liability has been voluntarily assumed. The youth had no occasion to be in the laundry. His presence there was without the knowledge or consent of anyone connected with the children's home, and was effected clandenstinely during the momentary absence of the laundress. When she left the laundry the current had been cut off the electric spinner. The lid was on the machine. The laundress had no reason to know or anticipate that the boy would enter the room and deliberately thrust his arm into the spinner.

Claimant's ward was born March 24, 1930. The accident occurred December 28, 1943. The boy was, at that time, three months less than fourteen years of age, and was in the fifth grade in school. An infant over the age of fourteen years is presumed to have sufficient discretion and understanding to be sensible of danger and to have power to avoid it. *Hairston* v. *United States Coal & Coke Company*, 66 W. Va. 324.

The boy explained his presence in the laundry in these words:

"Well, I was fooling around the furnace and I just went in there, and I was fooling around and went in there and stuck

my hand in the thing." He further stated: "Well, I was fooling around it there, and I went over there, and I just looked down in it, and I slipped my arm down in it." When asked if the laundress had not told him that he was not supposed to come in the laundry, he replied: "Well, sometimes she did." When asked if he had told the superintendent of the home or his wife, when they would not let him go to a show one night that he was going down there and stick his other arm in the machine, he answered: "Well, I might have done it." The boy was not required to work in the laundry and did not work there. When he went to the laundry on the occasion that the accident happened the door was closed. He testified that he "just had to bear down on it, and it would come open."

Anna Lee Helmick, the only person in the laundry when the accident occurred, told the boy not to put his arm about the machine.

Mrs. D. B. Gainer, assistant superintendent and financial secretary of the home, testified that all children were instructed not to go in various places and that the laundry was one place that boys especially are not to enter since they have no occasion to be there except when bringing laundry from the boys' basement. This witness described the spinner, which claimant contended to be a dangerous instrumentality, as follows: "It is a very smooth machine. It doesn't have any blades. It has a round whirl built on against the outside wall of the machine and at the top a very smooth copper band and there are no blades in it; it is perfectly smooth in the bottom, with just this nut in the center, and this section that goes around has holes drilled in it, and there are no blades in the machine."

Mrs. Hazel Collett, laundress at the home, testified that she had put her table linens in the dryer and walked into the adjoining room, and might have been gone as long as five minutes. The current had been turned off. The spinner still revolves for a short time after the current is turned off. It was during her absence from the room that the boy appeared there, walked over to the dryer and put his arm in it. She further testified that when she went to the laundry she was instructed that boys

were not to fool around machinery and always warned the boys accordingly.

I see no moral obligation on the part of the state to make an award in this case. An award, under the evidence, must amount to the bestowal of a gratuity. The Legislature is without power to thus appropriate the public funds.

I do not think that the jurisdiction of the court to make a determination of the claim is excluded by section 14 of the court act. The claim does not arise out of the "care" or "treatment" of a person in a state institution within the meaning of the statute.

The injury suffered by the boy makes a strong appeal to my personal sympathy; but as I view my duty, as a member of the court, I am unable to unite with my colleagues in recommending an award in his favor.

(No. 475—Denied)

LOIS THOMPSON, Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed August 29, 1945

When a student attending a state college and living in a dormitory maintained in connection therewith voluntarily uses a fire escape for purposes of ingress and egress rather than the main entrances to such building provided for such purposes and in consequence of such use of such fire escape sustains personal injuries for which the college authorities are in no way responsible a claim for damages suffered will be denied.

Lilly & Lilly for claimant;

W. Bryan Spillers, Assistant Attorney General, for the state.

ROBERT L. BLAND, JUDGE.

Claimant Lois Thompson, now a Wave in the armed forces of the United States, was formerly a student at Marshall College

in Huntington, Cabell county, West Virginia. She lived on the second floor in the dormitory known as College Hall. She alleges that prior to the summer of 1944 there was a stationary fire escape located on the east end of said College Hall, which extended from the third floor of the building to the ground, and that sometime during the summer of 1943 that part of said fire escape extending from the ground to the second floor was changed so that the metal steps, formerly used in said stationary fire escape were attached to a platform at the upper end and the other end of said metal fire escape was attached to a cable, pulleys and weights so that the one end could be lowered to the ground when in use, and when not in use would, by the said weights, pulleys and cable, be raised in a position horizontal to the ground.

Claimant further alleges that prior to the summer of 1943 said stationary fire escape was used by students, including herself, living in said College Hall as a means of ingress and egress from the second and third floors of said building, and that after the lower section of said fire escape, extending from the ground to the second floor, was changed in the summer of 1943, the students, including herself, living in said College Hall continued to use said fire escape as a means of ingress and egress from said building.

Claimant says that on and prior to April 19, 1944, the room she occupied on the second floor of said College Hall had a doorway leading from said room out onto the platform that extended down to said fire escape landing from the ground to said second floor, and on said 19th day of April, 1944, when she undertook to lower said fire escape from the second floor to the ground so as to permit two other girls who lived in said dormitory to use the fire escape as a means of ingress to said building, one of the cables on said fire escape, due to its defective and insufficient condition, broke, and said fire escape fell to the ground, as a result of which her right femur was broken, and that by reason of said injuries she was necessarily confined in St. Mary's hospital in the city of Huntington and

was forced to and did expend approximately $400.00 for hospital bills, doctor bills, medicine and treatment.

Claimant contends that she has been permanently injured as a result of her said accident and that her injuries and damages were caused by and through the negligence of the board of control of the state of West Virginia in the manner in which it maintained said equipment at said Marshall College. She seeks an award of $5,000.00 by way of damages.

The state denies all responsibility for the accident and contests the claim.

To establish the merit of her claim Miss Thompson and three other witnesses testified. These witnesses had been students at Marshall College. One of them, Eunice Rogers, was a room-mate of claimant. It was shown that during the school year beginning September, 1943, up to and including April 19, 1944, when her accident happened, claimant occupied a room in suite F-2 on the second floor of College Hall. This room led onto the fire escape extending from the ground to the third floor of the building. Students living on the second floor of the dormitory, desiring to reach the fire escape would have to go through this room. The college library is located a short distance east of the dormitory. A part of the campus and the athletic grounds extend on beyond and east of the library. There is a main entrance to College Hall on Third avenue and another general entrance from Elm street. Referring to the fire escape Miss Thompson explained: "Well, the girls —we all used it to come up and down in front of the library. We never did after hours or before hours; we would come in that way, made a shorter route that way." It was a shorter and more convenient route in going to and from the library. It would not, however, require but a few moments to use either of the main entrances to the dormitory.

It is necessary for a person on the second floor to go out toward the end of the fire escape in order that the weight of the fire escape would overcome or overbalance the weight con-

nected to the cable and pulleys and thereby lower it to the ground.

Explaining under what circumstances she was injured, Miss Thompson testified: "Well, there was two girls came down and they yelled for me to let them down the far end of the fire escape. The heavier you are the less you have to go out on it, so I had to walk first about to the end. When I got to the end, why, something happened. The thing went down and the rod that extended that connected the fire escape to the steps and to the cable struck me over the leg when it fell."

The claimant sustained a fractured femur of the right leg which extended into the kneecap. She was in the hospital for ten weeks, in treatment for four weeks and in a cast for five weeks. She had hospitalization privileges which paid a substantial amount of expenses incurred.

The evidence shows that she had used the fire escape three times on the day of the accident.

It appears that claimant has made substantial recovery. There has been perfect healing of the knee and neither leg is shorter than the other. She has successfully passed the examination required for enlistment in the Waves.

We cannot find from the evidence that the use made by the claimant of a fire escape was with the knowledge or consent of the authorities of the college. It does appear, however, that some of the students did use the fire escape from time to time for purposes of convenience. It was because of the misuse of the stationary fire escape by students that the board of control caused it to be changed to a cantilever or weight lift fire escape.

The contract for this work was awarded by the board of control in February or March 1943 to James J. Weiler & Sons, structural steel contractors of Huntington. The work to be done under this contract contemplated all the fire escapes of Marshall College, including the one on the east side of College Hall, where claimant sustained her accident, changing the sta-

tionary fire escape there to a cantilever or weight lift escape. After the completion of the work and before approving for payment the invoice submitted by the contractor, college authorities had L. W. Schmidt, architect of Fairmont, West Virginia to make a complete inspection of all the work performed by said contractors, and it was on the *basis* of the report made of this inspection that payment was made. The report of the inspection of the fire escape on the east side of the dormitory building showed it to be in good condition. Notwithstanding the change made in the fire escape, some of the students continued to use it for purposes of ingress and egress, although such use was not with the consent or approval of college authorities. We think that the board of control and the administrative officials of the college did all that could be reasonably expected to make the fire escape safe for the use for which it was intended, including fire drills. Just how the cable happened to break or what caused it to break on the occasion of claimant's accident is not made clear by the record. In any event it is not believed that the college authorities were in any way responsible for the accident.

Miss Thompson was an adult of good intelligence. She certainly knew that the fire escape was not constructed or intended to be used as a means of ingress and egress. She also knew that there were two main entrances to College Hall, either of which she could have used with safety. Had she exercised prudence and judgment she would have used these entrances. It may, we think, be safely said that the accident was the result of her folly.

After the conclusion of the introduction of evidence by the claimant and respondent, the attorney for the state moved the court to dismiss the claim upon the ground that it is a claim for an injury arising out of the care or treatment of a person in a state institution, which is excluded by section 14, article 2, chapter 39, Acts of the Legislature, Regular Session, 1945. Said section provides:

> "The jurisdiction of the court shall not extend to any claim:

"3. Arising out of the care or treatment of a person in a state institution."

Majority members of the court do not think that this provision of the statute excludes the court's jurisdiction of the claim in question. Judge Kunst is of a different opinion. Miss Thompson was not a ward of the state. Her situation demanded no peculiar care or treatment such as would be the case where one is confined in a mental or penal institution.

Upon due consideration of all of the evidence adduced we are of the opinion that the claim asserted against the state by Miss Thompson is not one for which an appropriation of the public revenues should be made by the Legislature.

An award is, therefore, denied and the claim dismissed.

G. H. A. KUNST, JUDGE, concurring.

This claim arose out of the care or treatment of Lois Thompson, a student, while living in a dormitory of and enrolled in Marshall College, a state institution, under the control and jurisdiction of the state board of control, respondent herein. By reason of the alleged negligence of its officers, employees and servants in not rendering to her the degree of care or treatment, which its duty to her under the circumstances justly demanded, by the employment of a defective cable, supporting the lowest section of a fire escape on a dormitory building of said college, which cable broke in the use of said fire escape by said student, and the section attached to said cable fell to the ground with the student, breaking the femur of her right leg; for which injury, the resulting suffering and expense an award of the sum of $5,000.00 is asked against said respondent.

After the hearing herein, the attorney general, representing respondent, moved the court to dismiss this case upon the ground that the court had no jurisdiction, because of the third provision of sec. 14 of art. 2 of ch. 39, of the Acts of the Legislature, regular session, 1945, which is as follows: "The jurisdiction of the court shall not extend to any claim . . .

arising out of the care or treatment of a person in a state institution. . . ."

I am of opinion that this motion should have been sustained and that no award could be made and that the case be dismissed.

In case No. 476, *Ward Huffman, Gd.* v. *Board of Control,* heard at the present term of court the same question as to the jurisdiction of the court having arisen, I was of opinion that the court had no jurisdiction, no award could be made and the case should have been dismissed. The reasons for my opinion having been fully stated therein, I see no reason for encumbering this record by its repetition in this case but refer to it as my opinion herein.

CHARLES J. SCHUCK, JUDGE, concurring.

I agree with Judge Bland's conclusion that an award should be refused, but base my opinion on grounds different from those set forth in his opinion.

The accident in question took place on April 19, 1944. The testimony shows (record pp. 61-62) that in the latter part of August, 1943, the board of control before accepting the work involving the changes and alterations on the fire escape in question, made by the contractor, had an examination made by an architect, one L. W. Schmidt, of Fairmont, West Virginia, who, after making a complete inspection, reported to the board that the fire escape in question, so far as the installation and changes were concerned, was satisfactory and the work very well done. The board, therefore, had performed its full duty and had the right to rely on the report made by the architect and consequently could not be held liable for an accident that happened subsequently and within eight months after the said investigation and report had been submitted. While it seems rather strange that within the said period of eight months the said fire escape could become so defective as to cause the accident to claimant, this, however, was a condition for which in my judgment the board of control could not be held liable, and which under all the circumstances the board could not antici-

pate or expect. The board had the right to rely on the architect's report and having done so was not responsible for claimant's accident happening within the eight months period after the said investigation.

(No. 405—Claim denied)

O. P. BRANN, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed August 31, 1945

The state does not guarantee the freedom from accident of persons travelling on its highways.

Claimant, in his own behalf;

W. Bryan Spillers, Assistant Attorney General for respondent.

ROBERT L. BLAND, JUDGE.

In this case the Reverend O. P. Brann, of 217 Wood street, Westernport, Maryland, prosecutes a claim against the state of West Virginia for the sum of $150.00. He bases his claim on the failure of the state road commission to erect and maintain posts or guardrails or other indications of danger on an improved black-top secondary road, known as the Beryl-Hampshire road, in Mineral county, West Virginia, at the place where it crosses the tracks of the Western Maryland Railway Company at Tusetown and where he drove his automobile over a stone wall and thereby wrecked the vehicle. He seeks reimbursment for the amount which he expended for the repair of the car.

About nine-thirty o'clock on Wednesday night, March 29, 1944, claimant was returning from Hampshire, where he had

conducted a religious meeting, when the accident occurred. Testifying in support of his claim, he said: "It was a dark, foggy night and when I came down to the railroad, why I missed the road. It is a very sharp turn there. To my notion it was very dangerous until it was fixed. They have put posts there now, or guardrails, like. And I went over the wall, about a four or five foot stone wall there, and the car dropped over, the front wheel and the rear wheel, and turned it up half-way and dropped it straight down, and I was fortunate enough not to get hurt, but it wrecked the car." When asked whether he had ever traveled the road before, claimant replied: "Oh, many a time, many a time. I have been travelling it for years as far as that is concerned." Continuing, he testified: "There is a rough place in the road on the opposite side and when I came down, I missed that, I pulled around it, like, and I came over across the railroad, it didn't take much of a swing to go over the wall."

Claimant said that he was not forced over the wall on account of the bad condition of the road. He admitted that, except for the absence of warning signs of danger, the road was in generally good condition, and that he had knowledge of and was familiar with the condition which existed at the point where his car went over the stone wall. In the performance of his ministerial duties he had traveled the road by day and by night. Within the month preceeding the accident "maybe two or three times." Although there was a warning sign conspicuously posted, he did not heed it or stop his car before crossing the railroad. No vehicles obstructed his right of way as he traveled to the point where the accident happened. Long prior to the night when his car went over the stone wall he was thoroughly familiar with the condition of the road at the point where it did so. "I was always very careful," he testified, "when I came across that track for that reason because it is a real sharp turn." Interrogated as to whether he understood before the accident occurred that the point at which the accident took place was a dangerous one, he answered: "Yes, sir, I did, and I always drove very careful and I was driving very slow this time: wasn't driving over ten miles an hour, but

I swung just too far, and you didn't have to swing very far to go over that wall."

Claimant does not show positively or satisfactorily that the accident actually occurred on the state road. From the showing made by the record the accident could have easily been on the right of way of the Western Maryland Railway Company which maintains the surface at the point where it happened.

It was shown by the testimony of Harry R. Taylor, maintenance supervisor for roads in Mineral county, who had been familiar with the Beryl-Hampshire road for nineteen years, that on March 29, 1944, the time of claimant's accident it was in good repair. At the approaches to the railroad crossing it was sixteen feet in width. No accident had occurred and no complaint had been heard about the alleged unsafe or dangerous condition of the road. Cleo Swecker, district maintenance engineer for distrcit 5, which includes Mineral county, never had any complaint about a dangerous or unsatisfactory condition of the road where the accident happened and testified that it was in good repair. After the accident four posts were erected on the road. The witness testified that three of them were on the Western Maryland Railway Company right of way and that permission was obtained by the road commission from the railroad company to erect them. Zeddie Harrington, a school bus driver and mail carrier in Mineral county, testifying for the State, said that he drove a sixty passenger school bus for the Mineral county schools over the Beryl-Hampshire road. He had been driving the bus for ten years. He drives it over the route where the accident happened. He never had any difficulty in getting his sixty-passenger school bus over the road and wouldn't say that the approaches to the railroad track at the crossing of the Western Maryland Railway Company were dangerous. He never had any trouble there with the bus.

Upon the whole evidence we are unable to recommend an appropriation of the public revenues of the state to satisfy the plaintiff's claim. We cannot give it our approval.

An award, is, therefore, denied and the claim dismissed.

(No. 426—Claim denied)

MRS. JOHN P. KATTONG, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed August 31, 1945

Appearances:

H. D. Rollins, for the claimant;

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES, J. SCHUCK, JUDGE.

Claimant, Mrs. John P. Kattong, asks damages in the amount of $150.00 for the loss of a horse which fell over an embankment adjacent to the highway or road near Bentree, Clay county, the horse having been killed by the fall.

The testimony reveals that the horse in question was running at large over the highway and adjacent territory; that it had come to a high embankment or cut in the highway near the Bentree schoolhouse and while on the said embankment in some manner fell to the highway and was killed. Claimant herself testified that the road or highway itself was "all right" and no testimony was offered to show that the condition of the highway or road or the traveled portion thereof, had any connection whatever with the accident. Of course, claimant maintains that the state should have a fence or barrier on top of the embankment to prevent any animals from falling over it, but no obligation, legal or moral, was imposed upon the state to construct or maintain such barrier, as is plainly shown by the testimony. Considering the mountainous and hilly conditions that present themselves along the highways in West Virginia, the cost of constructing such fences or barriers on the many embankments

would be prohibitive, and not being directly connected with the use of the highways themselves impose no obligation on the state. There is even a question as to whether or not the ground or place from which the horse fell was under control of the state road commission. At all events, we hold that the claimant is not entitled to an award and dismiss the claim.

(No. 490-S—Claimant awarded $51.00)

BESSIE L. KING, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 9, 1945

ROBERT L. BLAND, JUDGE.

The claim in this case is in the sum of $127.50 and arises out of a highway accident. The record thereof, prepared by the state road commission, was filed with the clerk September 9, 1945. The agency concerned concurs in the claim. It is approved by an assistant attorney general as a claim for which, within the meaning of the act creating the Court of Claims, an appropriation should be made by the Legislature.

The following facts, relied upon for an award in the amount claimed, appear from the record of the case.

About ten o'clock on the morning of September 17, 1944, claimant was driving a 1935 model Buick coupe automobile, bearing license number 157-031, in an easterly direction on state route 20, opposite the Hope Natural Gas Company station, at Hastings, Harrison County, West Virginia. The prison labor division of the state road commission was at the time excavating material from a hillside by the use of shovel and loading into

trucks to be hauled away. As she approached the place where the men were working she noticed the shovel and truck, the shovel being on the left side of the road and the truck crosswise of the road on the right side, with the front wheels on the berm, the truck being at a standstill. Claimant slowed down with the intention of stopping, but the flagman motioned her to proceed on her course. As she did so and was passing the rear of the state road commission truck the operator of the truck backed it into the automobile being so driven by claimant, thereby causing a collision, from which claimant suffered personal injuries and the vehicle she was operating was badly damaged.

The flagman admits that he gave claimant the signal to pass. The operator of the state truck claims that he looked back but did not observe the car's approach until he heard the collision.

Claimant's personal injuries consisted of bruised forehead, loss of tooth, and pain around the right margin of the thoracic cavity extending from the sternum to the vertebral bodies. For necessary attention and treatment she incurred liability to pay doctor and dentist bills amounting to $51.00 as shown by itemized statements made parts of the record. She should be compensated by way of an award for this amount. The balance of her claim, $76.50, is for damages sustained to the automobile which she was driving at the time of the collision. She is not entitled to an award for such damages because it appears from the record that the automobile did not belong to her but was owned by her daughter, Miss Leah King, who could have been made a coclaimant with her mother, but was not. We must deal with the record as it comes to us. Notwithstanding the concurrence of respondent in the whole claim and its approval by the attorney general's office, we cannot recommend an appropriation of $76.50 to claimant for damages to an automobile which she does not own. In a way the members of the Court of Claims are guardians of the public revenues.

The owner of the damaged automobile can hereafter file a claim with the state road commission for the damage to which the record shows she would be entitled, if she elects to do so.

An award is made in favor of claimant Bessie L. King for fifty-one dollars ($51.00) to cover personal injuries suffered by her on account of the accident hereinbefore mentioned, but an award to her for damages to the automobile in which she was driving—and belonging to her daughter—is denied, regardless of any agreement which may have been made by the officials of the road commission before the claim came to this court. Such agreements cannot control the action of the court, which must depend upon the showing made by the record of each claim which it may be called upon to determine. Only the head of a state agency is authorized by the court act to concur in a claim. No such power is given by statute to subordinate officials.

(No. 492-S—Claimant awarded $60.00)

EARL C. McCLURE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 9, 1945

ROBERT L. BLAND, JUDGE.

The claim asserted against the state in this proceeding is for the sum of $60.00. The state road commission concurs in it and its payment is approved by an assistant attorney general. From the record, prepared by the road commission and filed in this court on the 18th of September, 1945, it appears that employees of the state road commission, in the month of August, 1945, were burning brush on the right of way of secondary road No. 36, near Ft. Gay in Wayne county, West Virginia, and permitted the fire to get out of control and burn over about two acres of land owned by claimant. This fire destroyed approximately forty locust trees, three apple trees, a few oak and white pine trees, and several fence posts. Obviously the damage sus-

tained by claimant, who was without fault in the premises, should be compensated for by the state. In the opinion of the court the claim is meritorious and an award should properly be made therefor.

An award is, therefore, made in favor of claimant Earl C. McClure for sixty dollars ($60.00).

(No. 493-S—Claimant awarded $34.28)

W. C. NEAL, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 9, 1945

ROBERT L. BLAND, JUDGE.

Claimant's 1941 Chevrolet coupe automobile, bearing West Virginia license No. 91-444, was lawfully parked at 1517 Jackson street, in the city of Charleston, West Virginia, on the 21st day of December, 1944. About three-thirty o'clock on the afternoon of that day state road truck No. 130-67, operated by James L. Ramsey, an employe of the road commission, was being driven on said Jackson street, when bolts in the left rear wheel of the state vehicle sheared off while it was in motion. causing the dual wheels to separate from the truck and collide with the parked automobile. In consequence of the collision claimant's car was damaged to the extent that he was obliged to pay $34.28 for its necessary repair, for which amount he filed a claim with the road commission. The record shows that the driver of the state truck was at fault. The head of the department concerned concurs in the claim. An assistant attorney general approves it for payment.

An award is now made in favor of claimant W. C. Neel in the sum of thirty-four dollars and twenty-eight cents ($34.28).

(No. 462-S—Claimant awarded $13.01)

E. H. HALSTEAD, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 15, 1945

CHARLES J. SCHUCK, JUDGE.

Claimant asks damages in the amount of $13.01 occasioned by a collision between his Chevrolet sedan and a state road truck, occurring on the 20th day of October, 1942. In the collision the fender of claimant's car was damaged, together with other slight damages to the body, requiring the amount of repairs in question and for which the claim is presented.

The record shows that the driver of the state road truck was at fault; the head of the department concerned concurs in the claim. The claim is approved by the attorney general's office.

An award is therefore made in favor of claimant, E. H. Halstead, in the amount of thirteen dollars and one cent ($13.01).

(No. 479-S—Claimant awarded $13.60)

H. D. ARCHER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 15, 1945

CHARLES J. SCHUCK, JUDGE.

Claimant presents his claim in the amount of $13.60 for damages to his Chevrolet car, occasioned by his car being struck by a wheel that came off a passing state road truck.

The record reveals that at four o'clock P. M. on May 14, 1945, claimant's Chevrolet car met and was passing state road truck C-20-17 west of Quiet Dell, in Harrison county, when a wheel, as indicated, came off the state road truck, colliding with claimant's car and damaging it as set forth. The record further reveals that the driver of the state road truck had failed to have it checked, although forewarned by a wheel having come off the truck earlier in the day, and consequently failing to take the necessary precaution to have his truck in proper condition for use on the highway. His failure so to act was negligence.

The head of the department concerned concurs in the claim and the attorney general's office approves it for payment. An award is therefore made in favor of the claimant, H. D. Archer, in the sum of thirteen dollars and sixty cents ($13.60).

(No. 480-S—Claimant awarded $52.94)

B. F. GARVER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 15, 1945

CHARLES J. SCHUCK, JUDGE.

The claimant, B. F. Garver, while descending what is known as Wheeling Hill, in Wheeling, Ohio county, West Virginia, at about ten-thirty o'clock P. M. on March 13, 1945, met state road car No. 629-11 coming up the hill, which said road car in seeking to pass a bus crowded claimant's car off the road onto the sidewalk on his own or proper side of the road, the rear bumper of claimant's car catching the front wheel of the said road car, causing damage to claimant's car in the amount of $52.94. There was a conflict in the reports submitted by the respective drivers, but the state road commission investigator,

Mr. Laco M. Wolfe, after investigating all of the facts, adopted the report favorable to claimant. From the record as submitted it is found that the state road driver was negligent in the operation of his car.

The head of the department concerned concurs in the payment of the claim and the attorney general's office approves it for payment.

An award is therefore made in favor of claimant, B. F. Garver, in the sum of fifty-two dollars and ninety-four cents ($52.94).

(No. 481-S—Claimant awarded $9.44)

LEO R. BURKE, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 15, 1945

CHARLES J. SCHUCK, JUDGE.

Claimant asks damages in the amount of $9.44, the cost of repairing windshield glass broken by flying stone from rock being knapped by state road crew at and near Rupert, during the fall season of 1942, said flying stone having caused the damage in question as claimant was driving by where the said knapping of stone was taking place. The record reveals that the rock or shale that struck claimant's car windshield came from a hammer of the crew knapping the stone, causing the damage in question, the crew engaging in the said work not having taken the necessary precaution to protect passing automobiles.

The head of the department concerned concurs in the claim and the attorney general's office approves it for payment.

An award is therefore made to claimant, Leo R. Burke, in the sum of nine dollars and forty-four cents ($9.44).

(No. 482-S—Claimant awarded $80.47)

ELVIN HAMRICK, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 16, 1945

MERRIMAN S. SMITH, JUDGE.

On the night of January 20, 1945, claimant was driving his Chevrolet automobile on state route 15 towards Webster Springs, on the right side of the road, when state road commission truck No. 720-6, driven by Olen Gregory, an employee of the state road commission, enroute to Cherry Falls, collided with claimant's car damaging the Chevrolet to the extent of $80.47.

It appears from the investigation made by proper state employees that Olen Gregory was in an intoxicated condition and thereby not having his truck under control did sideswipe and collide with claimant's car, which could not be avoided by claimant.

The record shows negligence and reckless driving on the part of the state employee. The head of the department concerned concurs in the payment of this claim and the attorney general's office approves the payment.

An award is therefore made in favor of the claimant, Elvin Hamrick, in the sum of eighty dollars and forty-seven cents ($80.47).

(No. 484-S.—Claimant awarded $46.95)

L. C. MYLIUS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 16, 1945

MERRIMAN S. SMITH, JUDGE.

H. C. Bever, district engineer for the state road commission, while driving state road commission Chevrolet No. 729-2, in backing out of his private driveway in Weston, West Virginia, into the street, backed into the parked Dodge car of claimant L. C. Mylius, damaging the left door to the extent of $46.95.

It appears from the investigation and report that this damage to claimant's car was due solely to the negligence and failure to use due care on behalf of the state's employee. The head of the department involved concurs in the payment of the claim and the office of the attorney general approves its payment.

Therefore, an award of forty six dollars and ninety-five cents ($46.95) in favor of the claimant, L. C. Mylius, is hereby granted.

(No. 486-S.—Claimant awarded $335.35)

COLONIAL GLASS COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed October 16, 1945

MERRIMAN S. SMITH, JUDGE.

A state road commission maintenance crew undertook to dynamite a slide which had clogged up the outlet of a culvert on

U. S. route 19 at Deanville, just north of Weston, West Virginia, on March 7, 1945. Directly beneath this charge of dynamite was an abandoned twelve-inch sewer which had been out of operation for years, and its location was not known to the state maintenance crew. When the dynamite exploded there was a terrific explosion of sewer gas, which resulted in a large amount of broken tile and small stones being thrown on the roof of the nearby factory of the claimant, the Colonial Glass Company, damaging it beyond repair and necessitating a new roof for which the labor and material amounted to $335.35.

The full extent of this damage being done by negligence of the state's workmen and through no fault of the claimant, and the claim in the said amount having been approved by both the head of the state road commission and the attorney general's department, an award of three hundred thirty-five dollars and thirty-five cents ($335.35) is hereby recommended to be paid to the claimant, the Colonial Glass Company, of Weston, West Virginia.

(No. 489-S—Claimant awarded $91.27)

MELVIN O. ANDERSON, Claimant.

v.

STATE CONSERVATION COMMISSION, Respondent.

Opinion filed October 16, 1945

MERRIMAN S. SMITH, JUDGE.

On Saturday, June 30, 1945, George Hott, an employee of the state conservation commission, was driving a Chevrolet truck from cabin No. 11 in Lost River State Park, and on rounding a curve he passed the claimant, Anderson, driving his Dodge car towards cabin No. 12. By virtue of the fact that the truck was over the middle line of the road, and in swerving the truck to the right to avoid the accident, the rear of the truck struck the left

front and side of the Dodge car belonging to claimant, Anderson, the cost of repairs amounting to $91.27.

The record is conclusive as to the negligence of the state's truck driver, and no negligence is attributed to claimant Anderson. The director of the state conservation commission and the attorney general's office both approve the claim as just and correct.

Therefore, an award of ninety-one dollars and twenty-seven cents ($91.27) is hereby recommended for payment to the claimant Melvin O. Anderson.

No. 483—Claim denied)

PAULINE L. CHARLTON, administratrix of the estate of Kenneth O. Charlton, deceased, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed December 18, 1945

Opinion on rehearing filed April 29, 1946

No duty, express or implied, rests upon the state road commission of West Virginia to maintain the highways under its jurisdiction in more than reasonably safe condition for use in the usual manner and by the ordinary methods of travel; and the state does not guarantee freedom from accident of persons traveling on such highways.

W. W. Smith, for claimant;

W. Bryan Spillers, Assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

about sixty miles distant, and return on that day, eight members

Intending to go on a pleasure ride to the city of Charleston,

of the Huntington Motorcycle Club, and several guests assembled at Twenty-fourth street and Third avenue, in the city of Huntington, West Virginia, on Sunday afternoon, March 18, 1945. The group proceeded, in cavalcade form, led by O. I. Bond, captain of the club, in an easterly direction, over U. S. route No. 60, an extensively traveled highway. When they arrived at the overpass crossing the main line of the Chesapeake & Ohio Railway, near Culloden, in Putnam county, Kenneth O. Charlton, president of the club, riding immediately behind and to the right of Bond, hit a dip or depression at a point where a break in the concrete pavement of the road had been repaired with asphalt, and lost control of his machine. He managed to stay on his motorcycle until it had proceeded, in a wobbling condition, a further distance of two hundred feet, and again hit another depression in the road at a point where repair work had been done. This time he was thrown off the machine and sustained injuries from which he died later in the day at a Huntington hospital to which he had been removed.

In this case the administratrix of the decedent seeks an award in her favor, as such personal representative, in the total sum of $11,150.00, $10,000.00 thereof for the death of the decedent and $1,150.00 for the reasonable value of his motorcycle at the time of said accident, the funeral and other costs, outlays and expenses incident to and arising therefrom.

In her petition claimant alleges that the death of said Charlton was due to an accident sustained by him at a described point on said highway when he was thrown from his motorcycle by reason of a defect in the main or driven portion of the road, which defect was only a short distance beyond the crown of said overhead crossing and was not easily seen when one was approaching, or traveling said highway in an easterly direction. She contends that said alleged defect in said highway was brought about principally by a sinking or settling of the roadbed, fill or embankment, causing a crack or depression in the surface of the road, and that said alleged defect existed in said road for a number of months without having been repaired by the road commission. Claimant further contends that it was the duty of

the road commission to repair and keep in good order and in a safe condition said highway for the use, benefit and protection of the traveling public, and that its failure, carelessness and negligence to repair and keep repaired the said highway, at the point where the accident occurred, was the direct and immediate cause of said accident and the death of said decedent.

The width of the road in question is twenty feet of concrete. By reason of the constant travel and heavy traffic over the highway it becomes necessary to make repairs from time to time. At the point where the accident occurred there was a small hole or depression which had been repaired by the use of tar and chips. There are many miles of both primary and secondary roads in Putnam county and the evidence shows that the road commission was reasonably diligent in making repairs at all points where they were deemed necessary, giving first attention to the most important places calling for repairs. No good purpose would be subserved by detailing the testimony of the various witnesses. The members of the court visited the scene of the accident and observed the condition of the road where it had been repaired. Consideration of the whole evidence fails to satisfy the court that the road was not in a reasonably safe condition for public use and travel thereon.

It is shown that the road, at the point of the accident, was repaired by the road commission on January 19, 1945; February 12, 1945, and March 19, 1945. An employee of respondent testified that he traveled the road on Saturday evening before the accident and that he did not consider the road in any respect dangerous for public use.

It is not every accident that occurs on a state highway that calls for or justifies an award or appropriation of the public revenues.

Judge Brannon, in the opinion in the case of *Slaughter* v. *City of Huntington*, 64 W. Va. 237, says on page 241:

> "There seems to be a growing disposition whenever an injury is received on a street or highway to at once

> sue for damages under the expectation that the taxpayers will make compensation, no matter where the blame lies; that the public will guarantee the highway under all circumstances."

In 29th Corpus Juris at page 671, it is said:

> "The construction and repair of highways is a governmental duty belonging to the state, which can be performed only by agents designated for that purpose, or by municipal corporations upon which the performance of such duty is imposed by law, and, in either case, travelers using the highway have no legal right, in the absence of statute, to recover from the state or its officers for injuries caused by defects in the highway. The state may assume liability for such injuries; but such liability is limited by the terms of the statute, . . . "

In this court's opinion in *Lambert* v. *State Road Commission,* 1 Ct. Claims (W. Va.) 186, we stated:

> "The state is not an insurer against accidents upon its public highways. Claims against the state for injuries or death upon the public roads should be based upon legal or equitable right. For such claims only may awards properly be made."

No duty, express or implied, rests upon the state road commission of West Virginia to maintain the highways under its jurisdiction in more than reasonably safe condition for use in the usual manner and by the ordinary methods of travel; and the state does not guarantee freedom from accident of persons traveling on such highways.

Under the facts disclosed by the evidence in this case we are unable to see that a moral obligation rests upon the state to make an award in any amount in favor of the claimant.

An award is, therefore, denied by majority members of the court, and the claim dismissed.

CHARLES J. SCHUCK, JUDGE, dissenting.

While I fully agree that the state road commission in maintaining the highways under its jurisdiction is only required to

keep the said highways in a reasonably safe condition for use in the usual manner and by the ordinary methods of travel, and while the state is not called upon to guarantee freedom from accident to persons traveling the highways, yet I feel the record in this case, when carefully reviewed, shows beyond all question that the highway here concerned and upon which this accident happened, resulting in the death of claimant's husband, was not kept in a reasonably safe condition for ordinary travel, and that therefore an award should be made.

That the highway where the accident happened was in bad repair cannot be doubted when we take into consideration the evidence of the witnesses sponsored by the state itself, and in charge of making the necessary repairs to the road to make it reasonably safe. The fact is that this highway or road at the very place where the accident happened had been twice repaired within sixty days previous to the time of the accident, namely both in January and February of 1945, and that in both instances the repairs had been inadequately and improperly made, since, when the final repairs were made the day after the accident and as the evidence reveals, with more care and in a workmanlike manner, no defect has appeared in the road since that time; all of which indicates to my mind that the necessary care and caution was not taken in making the repairs in January and in February, and that if the same character of repairs had been made on either one of these occasions, then the accident would not have happened and this claim would not be before this court for consideration. In this connection the witness McGhee, who was a salesman, and who traveled the road about five days a week, testified that the hole in question was six or eight inches in depth and had been in the road for a period of at least six weeks previous to the time of the accident. He also testified that it was difficult to see the hole when coming over the ridge, or riding toward Charleston; such being the direction that the motorists in question were traveling at the time of the accident. The witness Sponagle, who lives nearby, says that the hole was patched several times before the date of the accident but that the patching did not hold and that the hole was in the road some three or four weeks previous to the time of the acci-

dent; that the hole was about four feet square and that the repairs that were made on the day after the accident were of such a type as to keep the road in good repair since that time. He also testified that previous to the time of the repairs on March 19, it was a dangerous hole, evidently, as shown by his testimony, one that would be highly dangerous to the traveling public. So far as the evidence reveals neither one of these witnesses, McGhee or Sponagle, have any interest in the outcome of this matter; did not know the parties, and, consequently, so far as we know, were no doubt testifying truthfully and without any feeling or bias in the matter.

Under all of these circumstances, there being nothing in the record that would sustain the imputation of contributory negligence, I cannot see but that the state was negligent in not keeping the road in proper repair, and therefore should be called upon, to some degree at least, to compensate claimant.

The only testimony that we had before us as to the speed at which the cavalcade was traveling was that they were moving at a rate of approximately twenty-five miles per hour. No witness testified to the contrary. In view of this fact, and the fact that it was difficult to see the holes in question until, as the witness above stated, you were "right on it," and in view of the further fact that no warning signs of any kind had been displayed, a fact which is not disputed but corroborated by the state's witnesses, no contributory negligence of any kind, in my judgment, can be attributed either to the deceased or any member of his party. If this deduction be correct then we have only the negligence of the state to deal with, and with disinterested witnesses giving us the full facts, we find that there was a hole six to eight inches deep and about four feet square; that it was difficult to see the hole when coming over the so-called ridge or elevation, traveling in the direction of Charleston; that the previous repairs had been undoubtedly inadequate, and improperly made; that the deceased was a very careful driver, and that not only he, but another member, at least, of his party was thrown at the same place by reason of the first hole, or the one nearer the crown of the road; that the dangerous condition

of the road was allowed to exist for at least three or four weeks before the accident; all of which facts, uncontradicted and taken together make a case of negligence that is not disputed in any way by the testimony in the case.

I am therefore of the opinion that an award should have been made.

ROBERT L. BLAND, JUDGE, upon petition for rehearing.

Upon a rehearing of this case which was allowed to enable the claimant to adduce certain evidence which she was precluded from introducing, without fault on her part, on the original hearing, the new evidence offered was merely cumulative in character and insufficient to change in any way the determination of the claim against the state formerly made by majority members of the court.

For reasons set forth in the original majority opinion, now ratified and confirmed, and with respectful deference to the opposing views expressed in the carefully prepared original dissenting opinion filed in the case by Judge Schuck, an award is denied and the claim dismissed.

CHARLES J. SCHUCK, JUDGE, dissenting.

The evidence adduced at the rehearing of this claim confirms in every particular the conclusions reached in my dissenting opinion and definitely shows that the overwhelming preponderance of the evidence is to the effect that the hole in question was highly dangerous to the traveling public; was six to eight inches deep and three or four feet wide; that it was difficult to see when traveling in the direction from Huntington to Charleston; was allowed to remain in its highly dangerous condition for a period of weeks before the accident; that previous repairs had been inadequate and that the repairs made on the day after the accident have been found good and sufficient, notwithstanding the fact that more than a year had elapsed from the date of the accident and final repairs to the time of the rehearing on the merits of the claim in this court.

The majority opinion on rehearing, ratifying the original majority opinion, is based solely on the theory that the new evidence offered was cumulative in character and insufficient to change the former determination; cumulative evidence, yes, in quality, given by taxpayers and wholly disinterested, and, so far as we know, creditable witnesses, who have no interest in the outcome of the matter and undoubtedly prompted solely by a desire to do justice as between the parties directly involved; cumulative evidence sustaining and supporting every material allegation showing negligence and proving the right and justice of the widow's claim; and cumulative evidence which was so qualitative as to make a good and sufficient case, without the consideration of the evidence presented in the original hearing; cumulative evidence, not merely quantitative or additional, but essential to every element of merit involving the claim here presented. I repeat that under these circumstances and the evidence, I would favor an award.

(No. 491—Claimant awarded $106.71)

E. Y. McVEY, Claimant,

v.

STATE DEPARTMENT OF MINES, Respondent.

Opinion filed December 18, 1945

MERRIMAN S. SMITH, JUDGE.

This claim for $106.71 was filed for the payment of an expense account for the month of June, 1945, by E. Y. McVey, former inspector and examiner for the department of mines.

The facts submitted were to the effect that claimant, McVey, had maintained his home and headquarters in Charleston four and one-half years while working for the department of mines.

On May 29, 1945 he received notice to go to Morgantown on June first, and to establish headquarters in that city. So on

June third Mr. McVey went to Morgantown carrying out the department's orders and remained there until June twenty-fourth performing his duties; he then went to Fairmont for the remainder of the month in performance of his orders.

As was customary he made out his expense account, for the month of June in the sum of $160.71, and filed it with the department, whereupon payment was refused upon the grounds that Morgantown was his headquarters from June first, and the state does not allow expenses for any of its employees while remaining at their headquarters.

Especially during the war-time period when housing conditions are critical, and even in normal times the state in changing the headquarters and homes of married employees should be considerate, and a period of at least thirty days should be given such employees.

It appears to this member of the court that the state should be fair and just in its treatment of all faithful and loyal employees.

Since sufficient notice of change of headquarters was not given the claimant and there was no question as to the fairness and justness of the daily expense incurred and as submitted, therefore an award in the sum of one hundred six dollars and seventy-one cents ($106.71) is hereby recommended for payment to the claimant, E .Y. McVey.

(No. 487—Claim denied)

INA ARRICK, Claimant,

v.

STATE BOARD OF CONTROL, Respondent,

Opinion filed December 18, 1945

Where escaped convicts steal and take away an automobile and after using the car, abandon it, having caused damages thereto, the state agency involved will not be held liable for the damages, unless negligence on the part of the said agency is fully shown and that such negligence contributed to and made possible the escape. *Ruth Miller* v. *Board of Control*, 1 Ct. Claims (W. Va.) 97, affirmed.

Appearances:

No appearance for claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

On the 17th day of July, 1945, two prisoners, John Murrell and Jack Spence, confined in the state penitentiary at Moundsville, escaped from the said prison and while so at liberty stole claimant's car from her garage located near Proctor, in Wetzel county, West Virginia. The car was driven by the said escapees to Chesapeake, Ohio, and when later found it was considerably damaged, no doubt from the manner in which it had been driven and operated and claimant was obliged to expend the sum of $269.61 for repairs to the automobile and to put it in proper running order. Only the matter of the escape is revealed by the record and no evidence is presented to show that those in charge of the prison or the state agency involved were in any manner responsible for or contributed to the escape of the prisoners in question; i. e. no negligence whatever on the part of the state agency involved or the prison officials is shown.

Under these circumstances consistent with our holdings heretofore made in similar cases, we deny the claim and refuse an award and dismiss the petition.

(No. 498-S—Claimant awarded $76.50)

LEAH KING, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 14, 1946

ROBERT L. BLAND, JUDGE.

The claim involved in this case is for the sum of $76.50.

The head of the state agency concerned concurs in the claim. It is approved by an assistant attorney general as a claim which should be paid by the state of West Virginia within the meaning and purpose of the act creating the State Court of Claims.

Said claim arises out of an accident which occurred September 17, 1944, when a Buick automobile, owned by claimant and driven by her mother, Mrs. Bessie L. King, in an easterly direction on state route No. 20, opposite the Hope Natural Gas Company's station, at Hastings, in Wetzel county, West Virginia, was damaged.

The prison labor division of the state road commission was at the time excavating material from a hillside by the use of a shovel and loading it into a truck to be hauled away. As the driver of the automobile approached the place where the men were working she noticed the shovel and truck. The shovel was on the left side of the road and the truck crossways of the road, on the right side, with the front wheels on the berm. Mrs. Bessie L. King, the driver of claimant's automobile, slowed down with the intention of stopping, but the flagman motioned her to proceed on her course. As she did so, and was passing the rear of the state road commission truck, the operator of the truck backed it into the automobile, causing a collision, in which the automobile was badly damaged. It is shown that the vehicle was damaged to the extent of the claim.

The court finds the claim to be valid and meritorious.

An award is, therefore, made in favor of claimant Leah King for the sum of seventy-six dollars and fifty cents ($76.50).

(No. 508-S—Claimant awarded $49.27)

CLARENCE QUEEN, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 15, 1946

ROBERT L. BLAND, JUDGE.

Claimant Clarence Queen seeks an award in this case for the sum of $49.27 to reimburse him for that amount of money paid for the necessary repairs made to his automobile after an accident which occurred July 2, 1945, on state route No. 33, near Pricetown, in Lewis County, West Virginia.

On the above date a truck was wrecked on the highway. Claimant had parked his 1939 Chevrolet automobile, bearing West Virginia license No. 70-272, on the opposite side of the road in order to assist the occupants of the wrecked machine to extricate themselves from it. When state road commission truck No. 730-19 approached the scene of the accident it stopped a few feet behind claimant's parked machine. Subsequently state road commission truck No. 730-89, following, struck the first mentioned state truck and drove it into claimant's car, causing the damages thereto for which the claim is made.

The state road commission concurs in the claim and it is approved by an assistant attorney general as one for which the state as a sovereign commonwealth should properly make compensation.

Claimant's automobile was sufficiently parked off the highway. Respondent admits that the operators of the state trucks were at fault. The claimant should not be obliged to bear the loss of the money which he has paid for the repair of his car.

Under all the facts disclosed by the record, which was prepared and submitted to this court by the state road commission, we are of opinion to, and do, find that the claim is just and proper and that an appropriation should be made by the Legislature for its payment.

An award is, therefore, made in favor of claimant Clarence Queen for forty-nine dollars and twenty-seven cents. ($49.27).

(No. 509-S—Claimant awarded $3.06)

T. L. JAMERSON, Claimant,

V.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 15, 1946

ROBERT L. BLAND, JUDGE.

State Road Commission station wagon No. C-21-28, operated by Edward Morris, was parked on a lot in front of the Kroger store, on East Washington street, in the city of Charleston, West Virginia, July 14, 1945. Mr. Morris had gone into the store. At the same time a 1940 model LaSalle automobile, bearing West Virginia license No. 36-558, owned by claimant T. L. Jamerson, and driven by Mrs. Margaret Jamerson Mottesheard, was also parked on the same lot while Mrs. Mottesheard did some shopping in the store. The operator of the state vehicle was backing out of the parking lot when he struck or caught the left fender of the Jamerson machine, damaging it to the extent of the amount of the claim

filed against the road commission as shown by an invoice of the repair made to it.

The head of the state agency concerned concurs in the claim. It is approved as a valid claim against the state by an assistant attorney general.

An award is now, therefore, made in favor of claimant T. L. Jamerson for the sum of three dollars and six cents ($3.06).

(No. 494-S—Claimant awarded $115.67)

CLEO SMITH, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 15, 1946

MERRIMAN S. SMITH, JUDGE.

This claim was made by Cleo Smith for damages sustained to his car under the following statement of facts. On August 11, 1944, about ten-thirty P. M., while driving towards Alderson, West Virginia, on state route No. 20, on his side of the road and passing a state road commission truck coming in the opposite direction and driven by Nick Coulter, the said state road truck swerved, crossing the center line of the road, and struck Mr. Smith's car on the left side, damaging the left front fender, axle, wheel spindle, hub, tire and tube, in the amount of $115.67. This accident was due solely to the negligence of the state truck driver, who was drinking at the time, and through no fault of the claimant.

The claim is concurred in by the state road commission and submitted under Section 17 of the court act. Therefore, an award is hereby recommended to be paid to Cleo Smith amounting to one hundred fifteen dollars and sixty-seven cents ($115.67).

(No. 496-S—Claimant awarded $15.30)

CHARLES A. HUDSON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 15, 1946

MERRIMAN S. SMITH, JUDGE.

On July 30, 1945, claimant's car was parked on state route No. 73 in Harrison county, when James C. Casto, the operator of the state road commission's road-sweeper, in sweeping the highway, drove too close to claimant's parked automobile, tearing and denting the left rear fender. Due to the negligence of the state road commission employee, and this claim having been concurred in and submitted under section 17, of the court act, an award in the sum of fifteen dollars and thirty cents ($15.30) is hereby made by this court in favor of Charles A. Hudson.

(No. 512-S—Claimant awarded $50.00)

CHECKER WHITE CAB, Inc., Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 16, 1946

CHARLES J. SCHUCK, JUDGE.

Claimant presents a claim for damages in the amout of $50.00 occasioned by injuries to one of its cabs by reason of a collision with state road truck C-29-10. The accident occurred at the intersection of Washington and Oney streets, in the city of Charleston, West Virginia, on the 11th day of June, 1945.

From the record as submitted it appears that claimant's cab was being driven west on Washington street, and the said

state road truck was being driven from Washington street over and across the intersection of said Washington street and Oney street as aforesaid. It is admitted in the report as submitted by the state road commission that the driver of the state truck was at fault and there appears to have been no negligence on the part of the driver of claimant's cab; but on the contrary it appears that the said driver was on the right side of the said street and not in any manner at fault so far as being involved in the said collision.

The state road commission concurs in an award, and it is shown that the accident was due solely to the negligence of the state truck driver. The attorney general's office, through the assistant attorney general, recommends payment. Therefore, an award is authorized to be paid to the said Checker White Cab, Inc., in the amount of fifty dollars ($50.00) and recommended to the Legislature for payment accordingly.

(No. 488—Claim denied)

BERNARD L. PARSONS, Claimant.

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed January 21, 1946

An award will not be made in favor of a claimant whose automobile was stolen and damaged by escapees of the West Virginia industrial school for boys at Pruntytown, unless culpability on the part of the state agency involved, its officers, agents or servants is fully shown and that such culpability contributed to and made possible the escape of such inmates.

Claimant, *pro se;*

W. Bryan Spillers, Assistant Attorney General, for the state.

ROBERT L. BLAND, JUDGE.

The claim involved in this case is submitted to the court for determination upon an agreed statement of facts. An auto-

mobile owned by claimant, Bernard L. Parsons, was stolen from his home in the city of Fairmont, Marion county, West Virginia, July 26, 1945, by three boys, two of whom were escapees of the West Virginia industrial school for boys at Pruntytown. The boys were subsequently arrested after the automobile had been recovered at Morgantown. During the time that the car was in their possession it was badly damaged. This damage is itemized as follows:

I	Window glass broken	$ 5.50
1	Door lock broken	3.50
2	Rear bumper braces broken	3.00
	Fuel line broken	4.00
	Brakes completely worn out	22.00

The total damage to the car amounted to $38.00. Claimant seeks an award for said amount.

The record does not show any culpability or responsibility on the part of the state board of control or the officers, agents or servants of the industrial school for the theft of the car in question. They did not contribute in any way to such theft. We have repeatedly held in similar cases that no responsibility shall rest upon the state warranting an appropriation of the public revenues for the relief of claimants. There is nothing in this case as we view it that would make it an exception to the rule which this court has heretofore followed. In the recent case of *Ina Arrick* v. *Board of Control*, claim No. 487, involving a claim for damages sustained to an automobile by reason of its theft by an escaped convict from the state penitentiary, in which an award was denied. Judge Schuck says in the opinion:

> "Only the matter of the escape is revealed by the record and no evidence is presented to show that those in charge of the prison or the state agency involved were in any manner responsible for or contributed to the escape of the prisoners in question."

Such may also be said to be true in this case.

Consistent with our former holdings, to which we now adhere, we must now deny an award in this case and dismiss the claim.

(No. 473-S—Claim denied)

EVA PETERS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 22, 1946

MERRIMAN S. SMITH, JUDGE.

The circumstances surrounding the accident for which claim for damages are sought by claimant are that on the night of November 30, 1944, a snowplow and a truck owned and operated by the state road commission, going in opposite directions on the highway leading south from Union, stopped alongside each other, blocking the highway. The snowplow was headed towards Union and the cinder truck headed south in the opposite direction. John Peters, son of claimant, who was driving south from Union when approaching the two parked trucks, states that the headlights on the snowplow so blinded him that he did not see the truck alongside, headed in the same direction he was traveling, so that he ran into the rear of the parked truck damaging the Chevrolet automobile. It was a windy and snow-stormy night, and visibility was low.

The state lawmakers, realizing that the driving of a 50 to 100 H. P. automobile on the highway makes it a dangerous instrumentality provided that the *operator* of such a machine must have same under control at all times. The fact that the state snowplow headlights were burning brightly, and especially since weather conditions rendered visibility low, was not negligence; on the contrary if the headlights had not been burning there would have been negligence. The evidence submitted regarding the burning of the taillights on the parked cinder truck is contradictory; however, if they were burning as they should have been, it is doubtful if they could have been seen by Peters, the driver of the approaching Chevrolet, since the bright headlights from the snowplow would have

obliterated them from his view, and since he was blinded by the glare of the headlights.

This accident could have been avoided if Peters had had his car under control, as provided by law, and if he had exercised care and judgment when his vision was blinded. He should have stopped and not rushed headlong into danger. This is a befitting example where the popular slogan "Lose a second and possibly save a life" would have been especially appropriate.

From the evidence submitted and the physical facts and conditions, there is no question but that John Peters heedlessly contrbiuted to the accident, and if he had exercised due care and judgment he could have averted same. Consequently an award is denied.

(No. 511-S—Claim denied)

APPALACHIAN ELECTRIC POWER COMPANY,
Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 23, 1946

ROBERT L. BLAND, JUDGE.

Claimant, Appalachian Electric Power Company, a foreign corporation created and existing under the laws of the state of Virginia, and duly authorized to do business in the state of West Virginia, wherein it has extensive operatons, has asserted a claim for $252.06 against the state road commission of West Virginia, in which said claim that state agency has concurred, and it has been approved by an assistant attorney general as a claim that, in view of the purposes of the act creating the Court of Claims, should be paid. The claim is submitted to the court for determination under section 17 of said act, which

provides the "shortened procedure" for the determination of claims against the state. The record was prepared by the state road commission and filed with the clerk of this court on December 18, 1945.

The contention of claimant is that certain transformers owned by it and located on state-owned property in the vicinity of Stewart street (route No. 16) at Welch, McDowell county, West Virginia, were damaged by fire on March 14, 1945, which said fire was caused by the carelessness and negligence of employees of the state road commission, and that the necessary and actual cost of repairs made to, and replacement of, said transformers amounted to the said sum of $252.06, as shown by itemized accounts therefor, filed with the road commission, and made part of the record in this case. Nothing is shown by claimant as to how the fire occurred, or what, if any, effort was made by the employees of the road commission to prevent its spread and damage to its property.

The state road commission, in order to support its concurrence in the claim, says that its employees in heating tar under the transformers in question failed to carry out instructions of the foreman to move the tar barrels away from the poles on which transformers were installed, and that the tar became too hot and exploded, resulting in damage to the transformers by fire where the tar was burning. It represents that if the barrels of tar had been placed away from the transformers there would have been no damage to claimant's equipment from fire.

The basis of the claim is the alleged negligence of the employees of the road commission, and if an award should be made in the case upon the showing made by the record it would necessarily be predicated upon such negligence, negligence admitted by the state agency proceeded against.

The record in question, upon the basis of which this court is asked to make a determination of the claim, consists of respondent's statement of fact and recommendation, certain correspondence between claimant and officials of the road commission, three *ex parte* statements made by a former maintenance

superintendent, the foreman in charge of the employees who were doing the patching work on the state road and the employees who had in charge the heating of the tar barrels, and a general summarization of the facts set forth in the record, and such investigation as was made by the road commission.

It appears that the damaged transformers were installed upon land owned by the state for the purpose of serving electricity to the Welch Emergency Hospital, an agency of the state. After the claim had been filed, Mr. C. L. Allen, district engineer, being in doubt as to whether the responsibility for the claim, if any, rested with the state road commission or the board of control, addressed a letter to the claimant asking by what authority the transformers had been installed upon state property. The reply addressed to him, and made a part of the record, admits that claimant had neither a lease nor easement for such purpose, but relied upon the fact that when claimant began to furnish electricity to the Welch Emergency Hospital in 1929 the public service commission of West Virginia approved a form which provided that claimant should have the right, if necessary, to construct its poles, lines and circuits on the property. This provision manifestly related to the property of the Welch institution, and not to the other property then owned or later acquired by the state.

The statute under which the claim is referred to the court provides that the claim shall be informally considered upon the facts submitted, and that if the court determines that the claim shall be entered as an approved claim and an award be made therefor it shall so order, and file its opinion with the clerk, but if the court finds that the record is inadequate, or that the claim should not be paid it shall reject the claim.

The claim in question was submitted to the court under section 17 of the court act, and under date of July 19, 1945, the state road commission requested an advisory opinion with reference to the responsibility of the state to make an award for the payment of the claim now under consideration, at which time the members of the court were unanimously of opinion

that it would be inadvisable to attempt to render an advisory opinion upon the meagre facts presented for the court's consideration, and under date of October 17, 1945, addressed a letter to the state road commission returning the record submitted for such advisory opinion for necessary amendment. It was at that time suggested that perhaps the better course to be pursued in the consideration of the claim would be to have it filed and prosecuted under the regular procedure provision of the court act. Respondent, however, withdrew its request for an advisory opinion and thereafter submitted the case as above stated under the shortened procedure provision of the statute. We are asked to ratify a recommendation for an award against the state on the ground of the admitted negligence of the state without having any sufficient opportunity to investigate the circumstances attending the fire that resulted in the damage to claimant's property. This court cannot be held to be a mere ratifying instrumentality, but must have proof before it to show the propriety of making an award before doing so.

The scheme for the creation of the State Court of Claims was carefully considered and worked out by an interim committee of the Legislature. In its report to the Legislature that committee expressly stated: "A shortened procedure is provided for small claims where no question of fact or liability is in issue." For such purposes only should the shortened procedure provision of the court act be used.

Majority members of the Court of Claims are of opinion that the record of this claim, as presented to it by the state road commission, is entirely too inadequate to warrant the making of an award at this time. A report was made to the road commission of the fire and of the damage done to the transformers thereby, but such report is not found in the record. We are not given the benefit of the information contained in that report. We do not feel that we are materially aided by the *ex parte* statements above mentioned.

The claim may very properly be rejected under the circumstances of its presentation to the court, without prejudice to the

claimant. The court act provides: "The rejection of a claim under this section shall not bar its resubmission under the regular procedure." We do not see any reason why this claim should not be prosecuted under the regular procedure of the court act, to the end that we may have all the information obtainable in relation to its merits. If it shall hereafter be resubmitted to the court and prosecuted under its general procedure and show itself to be entitled to an approved award, it will be afforded an opportunity to do so.

Because of what is conceived to be the inadequacy of the record, and without passing on the general merits of the claim in question, an award is at this time denied therefor, and the claim dismissed by majority members of the court.

Judge Schuck is of opinion that an award should be made in the case and dissents from the action of the majority members of the court.

(No. 497—Claim denied)

JOHN B. McGHEE, Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed January 29, 1946

Appearances:

John B. McGhee, the claimant, in his own behalf;

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimant John B. McGhee at the time a deputy warden of the medium security prison at Huttonsville, was called upon by M. E. Ketchum, the warden of the state penitentiary to pay a portion of the premiums of two certain insurance policies

carried presumably to protect them as state agents or employees against any liability to third persons occasioned by injuries to such third persons through the negligent operation of state trucks used in connection with carrying on and operating the state prison in question. Complying with said request claimant made two payments, one of $200.00 and one of $55.98 to the said warden; which payments are admitted and as shown by the evidence were in turn paid to the insurance agency, through which the policies were obtained.

An examination of the policies in question shows that in policy No. A346882 for which claimant paid his $200.00 installment, he was not insured at all as he is nowhere mentioned in the policy as being among those protected, but on the other hand the policy was payable to the state of West Virginia, the West Virginia State Penitentiary, Warden M. E. Ketchum and the Board of Control, and also the West Virginia Security Prison; policy No. A366146 was made to Warden M. E. Ketchum and John B. McGhee, the claimant, and to the payment for this last mentioned policy the claimant contributed $55.98. The first policy was issued on September 29, 1943; the second on March 29, 1944.

Heretofore, on the second day of August, 1943, this court by an advisory opinion, rendered at the request of the state auditor held that a claim for a yearly insurance premium on a policy issued to cover public liability and property damage on state automobiles owned by the conservation commission and operated by state agents and employees, was not collectable as a claim against the state. This opinion was subsequently confirmed by another advisory opinion rendered January 13, 1944, *Dougan, Bretz & Caldwell, Agts., etc.*, v. *Auditor*, 2 Ct. Claims (W. Va.) 260, when the following question was submitted for an opinion by the auditor.

> "Can the state properly pay insurance premiums on cars owned by the state, inasmuch as there is a question as to whether any enforceable liabiliy accrues against the state in case of property damage or personal injury."

In answer to the question submitted this court held that the state had no authority express or implied to pay such insurance premiums, and that only an act of the Legislature conferring the necessary authority could warrant the state or any of its departments to make the payments of the premiums in question.

Subsequently thereto, by an act of the Legislature chap. 71, page 295, acts of the regular session 1945, state officers, boards, commissions and agencies of the state were authorized to spend public funds for public lability insurance against bodily injury or property damage caused by the negligence of drivers of motor vehicles owned and operated by the state or any of its agencies.

It is apparent therefore, that the claim under consideration arose at a time when the Legislature had not yet conferred any authority on any state agency or department to incur an obligation arising out of public liability insurance so far as the payment of the premium was concerned. Consistent with our advisory opinions herein referred to, we, of course, must deny the claim. However, in view of the fact that the insurance here involved was improperly and improvidently issued against which the insurance company, if called upon to pay a loss or damage could well have denied liability, the policies in question being unenforceable, the claimant would be justified in seeking the return of the amounts paid by him not only from the insurance company which issued the policies, but as well from the warden who improperly collected claimant's portion or part of the premiums. This, of course, is a matter for him to decide and to determine what course he will eventually pursue in having the amounts here claimed paid back or returned to him.

An award is accordingly denied.

MERRIMAN S. SMITH, JUDGE, concurring.

The claimant, not being represented by counsel, failed to present the policies in evidence before the case was submitted.

After receiving and reviewing copies of the policies by the court, it appears that the policy issued September 29, 1943, for

which claimant paid $200.00, was cancelled pro rata March 29, 1944. Consequently he is due a credit of $100.00 on the amount paid.

It further appears that the policy written March 29, 1944, for which Mr. McGhee paid $55.98, was cancelled January 1, 1945, so he was entitled to a return premium of $9.33 from the company.

As set forth in the court's opinion, by Judge Schuck, the claimant should be refunded the premiums by the insurance company, since there was no liability under the policies from inception. Since both policies were cancelled, a return premium of $109.33 should have been refunded Mr. McGhee at the time of cancellation of the contracts.

No. 501—Claimant awarded $45.90)

ROY L. ELLISON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed January 30, 1946

In claims arising out of automobile accidents, this court will give utmost consideration to the physical facts surrounding the circumstances, especially where the testimony of the witnesses is conflicting, weak and indefinite.

Appearances:

Claimant, in his own behalf;

W. Bryan Spillers, Assistant Attorney General, for the state.

MERRIMAN S. SMITH, JUDGE.

About three-thirty P. M. on June 5th or 6th, 1945, Roy L. Ellison, of Charleston, West Virginia, was driving on state route No. 10, enroute to Logan from Lyburn. In passing a

state road truck, driven by O. H. Farley, going in the same direction, the driver of the state truck pulled to his left and the toolbox on the front bumper of the truck struck claimant's Ford sedan, damaging the bumper, doors and front and rear fender in the amount of $45.90.

From the evidence of the witnesses and taking into consideration the physical facts of the damage to the Ford sedan, it appears that there was no contributing negligence on the part of the claimant, and in order to have inflicted the damage sustained to the Ford sedan, Farley must have swerved his truck to the left, sideswiping the entire right side of claimant's car.

From the physical facts and evidence presented, an award is hereby made in favor of Roy L. Ellison in the amount of forty-five dollars and ninety cents ($45.90).

(No. 500—Claimant awarded $30.28)

AETNA CASUALTY and SURETY COMPANY
Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed March 21, 1946

Where the facts supporting a claim against the state warrant it an award will be made under the doctrine of subrogation.

S. J. Knapp, for claimant;

W. Bryan Spillers, Assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

The claim in this case arises out of the accident for which an award was made in case No. 363-S, *Mabscott Supply Company* v. *State Road Commission*, 2 Ct. Claims (W. Va.) 349,

in which an opinion was filed July 28, 1944. In that case the claim was for $50.00 and the award was made for that sum. The claim was concurred in by the state road commissioner and approved by an assistant attorney general as a claim which, within the meaning of the court act, should be paid by the state. The facts disclosed by the record in that case revealed that on December 13, 1943, one Charles Hunt, an employee of the state road commission, was driving state road truck No. 1038-13, distributing cinders on route 19-21, near Prince Hill, Raleigh county, West Virginia, when it collided with a Ford truck owned by said Mabscott Supply Company, which truck was properly parked on the side of the road, and caused damage thereto, to repair which said claimant incurred costs amounting to $80.28. The road commission truck, which ran into the private truck, was being operated, on an ice-covered road, without chains. The claimant carried insurance on its truck, but the insurance policy contained a deductable clause in the sum of $50.00. The Aetna Casualty and Surety Company, claimant in this case, which had issued the policy on the truck, paid the Mabscott Supply Company $30.28, leaving a balance of $50.00 necessary for the repair of the damaged vehicle, for which sum an award was made by the court upon an informal consideration of the record of the claim, prepared by the road commission and filed under section 17 of the court act.

In the present case claimant, Aetna Casualty and Surety Company, seeks an award for the said sum of $30.28, the amount which it was obligated to pay to Mabscott Supply Company under the provisions of the policy of insurance which it had issued in its favor. Although the facts in the Mabscott case and the facts in this case are identical, the state denies responsibility for the payment of the claim.

Claimant prosecutes its claim upon the theory of subrogation. It maintains that since it was obliged under the policy of insurance referred to to pay Mabscott Supply Company the said sum of $30.28 because of the damaged condition of its truck caused by the wrongful act of the employee of the state road commission

in colliding with said truck, it has the right to be reimbursed by the state for such payment.

It is well known that the doctrine of subrogation is a creature of equity. The application of the rule is intended to do justice. Under the title of subrogation in that splendid authority, American Jurisprudence, vol. 50, section 36, page 706, it is said:

> "The doctrine of subrogation may be invoked in favor of persons who are legally obligated to make good a loss caused by the negligent or tortious acts of another. Indemnitors fall within this rule. By contract, express or implied, they bind themselves to save harmless the person indemnified, and where they do so by paying the loss or damage they are undoubtedly entitled to be subrogated to the indemnitee's rights against the person responsible. A frequent application of subrogation of this character is found in the case of insurers, as, for example, an insurer against employers' liability. Another instance is where an employer, having become obliged to respond in damages for an injury caused solely by his employee's negligence, is subrogated to the injured person's right of action against the employee . . ."

If the state were suable it is clear, we think, that claimant would be entitled to be subrogated to the right of Mabscott Supply Company to look to the state for the full amount incurred by it in the repair of its damaged car. Since claimant paid $30.28 of that amount it should in the exercise of equity and good conscience be subrogated to the position of the supply company.

Upon full consideration of all the facts arising upon the hearing of the instant claim, we are of the opinion that it is only right and fair that claimant should be reimbursed for the amount which it is obligated to pay and did pay for Mabscott Supply Company and accordingly an award is now made in favor of claimant, Aetna Casualty and Surety Company, for the sum of thirty dollars and twenty-eight cents ($30.28).

(No. 514-S—Claimant awarded $200.00)

MARTHA CLARK, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 9, 1946

ROBERT L. BLAND, JUDGE.

While engaged in construction or maintenance work on secondary road No. 11, in Lincoln county, West Virginia, employees of the state road commission found it necessary to blast a rock ledge about thirty feet distant from a bored well on the premises of claimant, who resides about six miles above Richland, in said county. The blasting of this ledge caused the water in claimant's said well to become muddy and unfit to use. Claimant says that she believes that $200.00 will compensate her for the damage done to the well. After a thorough investigation of the facts concerning the damage done to the well and under date of December 27, 1945, E. L. Worthington, then state maintenance engineer, having indicated in writing his approval of the claim for the said sum of $200.00, and under date of December 18, 1945, Ernest L. Bailey, state road commissioner, having concurred in the claim for that amount and an assistant attorney general having approved the claim as one which should be paid by the state, this court is of opinion that the said sum of $200.00 would enable claimant to drill another water well on her premises, and that under the circumstances disclosed by the record her claim is just and meritorious, and should be entered as an approved claim and an award made therefor.

An award is, therefore, made in favor of claimant, Martha Clark, for the sum of two hundred dollars ($200.00).

(No. 520-S—Claimant awarded $383.75)

DR. WM. C. McCUSKEY, Claimant,

v.

STATE HEALTH DEPARTMENT, Respondent.

Opinion filed April 9, 1946

MERRIMAN S. SMITH, JUDGE.

Claimant, Dr. Wm. McCuskey, a duly appointed member of the public health council, serving for two meetings, namely October 2, 1944 and February 25, 1945, held at Charleston, West Virginia, performed his duties by preparing and holding the examinations and grading the papers of the applicants, over a period of twenty-three days, and due to pressure of his practice as a physician during the war-time emergency failed to present his claim for per diem and expenses by August 31, 1945, as required by statute.

The claim, in the amount of $383.75, having been audited and found just and correct and in order, was concurred in by both Dr. J. E. Offner, state health commissioner, and the attorney general's department.

This court is of opinion that this is a just claim, and an award is hereby made in the sum of three hundred eighty-three dollars and seventy-five cents ($383.75) to the claimant Dr. Wm. C. McCuskey.

(Nos. 528-S, 529-S—Claimants awarded $238.05, $20.00)

MRS. R. R. FANKHOUSER, Admx. of the estate of RUSSELL R. FANKHOUSER, deceased, MRS. R. R. FANKHOUSER, in her own right, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 10, 1946

CHARLES J. SCHUCK, JUDGE.

On July 20th, 1945, Russell R. Fankhouser, since deceased, was driving his automobile, having his wife and others as fellow-passengers, over and along state highway route No. 20, about four or five miles east of New Martinsville in Wetzel county, following a state road truck; desiring to pass the said truck he sounded the horn of his car as a warning signal, pulled out to pass the said truck and while so doing the truck, operated by a state prisoner working for the road commission, without warning or signal to Fankhouser, suddenly pulled over and across the highway, colliding with said Fankhouser's car, crowding it off the highway, causing damages to said automobile in the amount of $238.05, and causing injuries to his (Fankhouser's) wife for which she was obliged to expend the sum of $20.00 in obtaining medical relief. Two claims are presented for our consideration, one by Mrs. Fankhouser, as the administratrix of her husband's estate, in the amount of $238.05, and one by Mrs. Fankhouser personally for her injuries, in the amount of $20.00. Both claims are herewith considered together.

An investigation of the facts was made by the state road commission's authority, namely Laco M. Wolfe, special claims division chief, whose report shows the facts to have been as herein outlined, and which report absolves claimants from any negligence whatsoever. This report is concurred in by the assistant attorney general, who approves the claims and recom-

mends them for payment by the state. The court is of the opinion that, from the facts as shown, the state is morally bound to pay the claims and finds further that the amounts asked for, to wit $238.05 for damages to the automobile and $20.00 for injuries to Mrs. Fankhouser, are just and reasonable. The claims are approved accordingly in the aforesaid amounts, namely, two hundred thirty-eight dollars and five cents ($238.05 in favor of Mrs. R. R. Fankhouser as administratrix of the estate of R. R. Fankhouser, deceased, and twenty dollars ($20.00) to Mrs. R. R. Fankhouser, personally, and awards are herewith made to the respective claimants in the aforesaid amounts.

(No. 513—Claimant awarded $100.00)

RUSSELL RANDOLPH, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 15, 1946

Failure of the state road commission to provide and install necessary warning signs of danger at a point where a bridge on the state highway had been washed out by a flood may, in circumstances, warrant an award in favor of the claimant by reason of such condition of affairs.

H. D. Rollins, for claimant;

W. Bryan Spillers, Assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

The claim involved in this case grows out of an accident on a state highway where a bridge spanning a creek had been washed out by a flood and no warning sign of danger had been installed at the point where such bridge had been located.

Claimant Russell Randolph contends that state route No. 58 is a secondary highway leading from an oil refinery at the mouth of Falling Rock Creek on Elk River, below the town of Clendenin in Kanawha county, West Virginia, up said creek for a distance of several miles. He represents that there were several bridges on this highway and that one of these bridges, by which said highway crossed said Falling Rock Creek, about one mile above the mouth thereof, was washed out by a flood in the month of August, 1945, leaving said highway without means of crossing the said creek at said point, but that thereafter the said road commission put barriers up on the highway below said bridge, and either the public or the commission arranged a makeshift crossing below the place where said bridge had been for the use of persons who found it necessary to travel said highway, but put no guards, signs or barriers on said highway above the creek, thereby leaving the highway, at the point where the same went upon the place where the bridge had been, unguarded and dangerous for persons traveling said highway, coming down said creek, particularly at night. He further contends that at the point where said bridge had been washed out on the upper sdie, or side leading up the creek, the highway was approximately twenty feet above the creek bed below and the decline to said creek bed was at an angle of ninety degrees or straight up and down, and was left unguarded and unobstructed. These contentions of plaintiff are very well supported by the evidence which he introduced in support of his claim.

On the night of October 31, 1945, claimant, who was then in the naval service of the United States but at home on leave, met, in the city of Charleston, an acquainance and friend who resided a short distance from the point at which the bridge aforesaid had washed out, and very kindly consented to drive him, in claimant's automobile, to his home. Claimant was not acquainted with the road and knew nothing about the washout of the bridge. It is true, as disclosed by the evidence, that claimant's friend did direct him how to cross the creek at the makeshift bridge. Claimant left the home of his friend on his

return to Charleston about one thiry o'clock on the morning of October 31, 1945, traveling on the road directly to the point where the washed out bridge had spanned the creek. His automobile was precipitated over the embankment and badly damaged, but he escaped with minor injuries. He asserts his claim against the road commission for the sum of $300.00. One witness who testified as to the damage done to the automobile placed it at approximately $375.00, but this estimate included the painting and enameling of the vehicle. The testimony of claimant as to the amount he actually paid for the car is somewhat in doubt, as disclosed by the evidence, especially in view of his contradictory statements. He testified that when he bought the car he paid $300 for it, whereas at the time of purchase he swore, under oath, that he paid $100.00 for it.

It is made clear that after the accident the automobile was in exceedingly bad condition, although it could proceed to the garage upon its own power, and claimant was obliged to spend considerable money to have it repaired. The exact amount of said outlay is not made clear to the court. In any event claimant was able to sell his automobile for $175.00.

The court was not favorably impressed by the integrity of the testimony of claimant or by his contradictory statements while testifying, but nevertheless the record makes it clear that he did in fact sustain a property damage on account of the unguarded condition of the highway at the point where the bridge had been washed out, and under the peculiar circumstances of the case it is believed that notwithstanding the unsatisfactory testimony given by him, he is entitled to a reasonable award for the damage which he has suffered, but this is especially so in view of the failure of the road commission to offer any testimony whatever to explain why it would permit the highway at the point where the bridge had been to remain without any sign of warning of danger from the date of flood in August to the date of the occurrence of the accident on the thirty-first of October following. It would seem that persons unacquainted with existing conditions traveling the highway should be properly

and sufficiently warned of the danger in crossing the creek at the point where the bridge had been washed out.

In view of the failure of the road commission to install sufficient warning signs, and the peculiar circumstances attending the case in question, an award will be made in favor of claimant, Russell Randolph, in the sum of one hundred dollars ($100.00), the court being of opinion, from all of the evidence in the case, that said amount will amply compensate him for such damage as he sustained.

(No. 474 Claim denied)

HENRY R. BRADY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed April 18, 1946

The state does not guarantee freedom from accident or safety of pedestrians on its public highways, and the duty of the state or highway commission is a qualified one. *Harmon v. Road Commission*, 2 Ct. Claims (W. Va.) 329, *Wootten v. Road Commission*, 2 Ct. Claims (W. Va.) 393.

James F. Burns, for claimant;

W. Bryan Spillers, Assistant Attorney General, for the state.

MERRIMAN S. SMITH, JUDGE:

On the thirty first day of March, 1944, Henry R. Brady, claimant, about four o'clock in the morning, was walking along the public highway on his way home from work, at a point about one hundred and fifty feet past the intersection of the Panther Lick Run Road to McCurdesville and the Grant Town to Fairview road, in the direction of Fairview, Marion county, and while so walking down this hill or steep grade, slipped on

ice and fell, sustaining a compound transverse fracture of the right tibia, middle third. A fellow-miner by the name of Joseph Klara was walking alongside of him when he slipped and broke his leg. This stretch of road was built of concrete and it is a secondary road maintained by the state road commission, and from the evidence presented the road is built on solid rock and the ditch line and berm is rather short. During the night the water ran down over a part of the highway and ice accumulated thereon, whereupon the claimant alleges negligence on the part of the state road commission employees.

This court has held that the state does not guarantee freedom from accident or safety of pedestrians on its public highways, and the duty of the state or highway commission in the matter of the removal of obstruction caused by snow or ice is a qualified one.

The claimant, Brady, had been walking this road for a month immediately preceding the accident and was undoubtedly familiar with its grade and conditions prevailing at the time. Also, from the evidence, it appears that this same leg was broken in 1936 in practically the same place, and he was under treatment for a period of four years, not returning to his work until 1941. It is unfortunate that this accident should have occurred, but the state did provide hospitalization and surgical treatment for him under the department of public assistance. The members of the court entertain the greatest sympathy for him, yet it would appear from the evidence that the state road commission or its employees were not guilty of negligence. Under the general law the state is not liable to persons injured upon its public highways by reason of defects therein and since our state has not by general law assumed liability for the negligence of its officers and agents, the opinions of the Court of Claims to the Legislature depend upon the facts of each particular case as they may arise from time to time, and wherein a moral obligation, or under equity and good conscience a duty for the sake of public policy, prevails.

An award is denied and the case is dismissed.

(No. 510—Claim denied)

DOROTHEA GROGAN, Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed April 29, 1946

There is no provision in the budget act for the payment of overtime to employees working on a monthly wage scale as set up by the budget director: no provision is made for a contract of employment to such employees either express or implied, covering payment for overtime.

H. W. Bowers, for claimant;

W. Bryan Spillers, Assistant Attorney General, for the state.

MERRIMAN S. SMITH, JUDGE.

On May 16, 1945, claimant went to work for a Miss West, secretary of the West Virginia board of examiners for registered nurses, a subsidiary of the state agency, board of control, at its office in Charleston, Kanawha county, West Virginia, at an agreed monthly salary of $150.00, the office hours being from nine A. M. to five P. M., Monday through Friday, and Saturdays from nine to twelve noon. Claimant worked for two months or until July 16, 1945, wnen she tendered her resignation.

Claimant testified that for many days she worked overtime and read a detailed account of each day's time put in, including the hours and minutes, making a total of about fifty-six hours, or eight days, overtime, for which time she now makes claim against the state for reimbursement. At the time of making this daily timetable it was not made for the purpose of claiming overime pay but for the purpose of having it applied to her vacation credit.

In practically all departments of the state there are times during the year when certain emergencies arise and more work

is necessarily required so that the employees are compelled to work overtime unless extra help is employed, and the budget act does not set up a fund for overtime payment of such employees paid on a monthly wage scale. The evidence in this case was conclusive that no provision is made for overtime payment of the salaried employees of the state and whenever anyone applies for a salaried position with any of the state agencies they have notice that the state makes no contracts, either express or implied, that they are to receive extra compensation for hours worked overtime during the course of their regular duties. There is no reason why an employee of the state should not be as loyal, interested, cooperative and conscientious as with a private organization, and when by virtue of incompatability of temperament, jealousy or personal prejudices there arises discord and discontent between an employee and his or her superior, then for the good of all concerned resignation should be in order. It is not encumbent upon the state to reimburse disgruntled employees for working overtime when necessity so demands or the superior by virtue of bad judgment or mismanagement fails to cooperate or to be considerate of those under his or her supervision.

An award is hereby denied and the case dismissed.

ROBERT L. BLAND, JUDGE, dissenting.

It sufficiently appears from the majority opinion that relations between the executive secretary to the board of examiners for registered nurses and the claimant, a former stenographer for the board, were anything but cordial. Such fact, however, should constitute no valid reason for the denial of an award in this case, when it appears, as is clearly shown by the weight of the evidence, that claimant was obliged on account of the exacting requirements of her superior officer to perform duties after regular working hours, requiring additional time and greater labor, which could easily have been done between nine o'clock A. M. and five o'clock P. M. of each working day. There is a well-known adage worthy of all acceptation that "a laborer is worthy of his hire." It is manifest from the record that

claimant was capable and well qualified to discharge the duties devolving upon her position. She was well recommended to the board by the executive secretary of the state nurses association, who fully acquainted claimant with the usual and customary hours of employment. There is nothing in the record showing failure on the part of claimant to discharge all the duties incumbent upon her promptly and efficiently. It is by reason of the manner in which the work of the office was administered by the present executive secretary to the board that claimant was obliged to do overtime work. It is needless to advert at any length to the convincing facts appearing in the record. Suffice it to say that in view of the undisputed facts disclosed by the record supporting the claim in question, there would seem to be without doubt a moral obligation on the part of the state to compensate the claimant for her excessive overtime employment. It is shown that at least on one occasion overtime compensation was paid by the present executive secretary to the board, although she professes to have made the payment out of her own funds. Why she should have done this is not apparent.

By reference to chapter 1 of the acts of the Legislature of West Virginia, regular session, 1943, the purpose of which act is to appropriate the money necessary for economic and efficient discharge of the duties and responsibility of the state, it will be observed that to pay the per diem of members and other general expenses of the state board of examiners for registered nurses the sum of $4000.00 each year of the succeeding biennium was appropriated, and by reference to chapter 11 of the acts of the Legislature of West Virginia, regular session, 1945, it will be further noted that to pay the per diem of members and other general expenses of the board, an appropriation of $6500.00 was made for each year of the succeeding biennium. It thus appears that within the contemplation of the Legislature additional duties and greater labors were to be performed by the board. The overtime or extra work performed by claimant overlapped between these two appropriations. That there was money available to pay claimant for

eight days overtime work done by her is made quite clear. When two hundred and fifty nurses present for examination in the legislative chambers were waiting the results of their examinations, it is manifest that the holding of such examinations and grading the papers thereafter presented a situation that called for extra work, and yet there was nobody to do this extra work except claimant herself. The record does not disclose that the executive secretary proved herself to be of much assistance.

I would favor an award compensating claimant for eight days overtime work.

(No. 519—Claim denied)

JOE M. HUTCHINSON, Claimant.

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed May 1, 1946

The fact that a stone or rock falls from the hillside adjacent to a public road or highway, striking and wrecking a passing truck, does not of itself constitute negligence on the part of the state road commission. See *syllabus Clark* v. *Road Commission*, 1 Ct. Claims (W. Va.) 230.

Appearances:

Kay, Casto & Amos (Dale G. Casto) for claimant;

Eston B. Stephenson, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

On February 14, 1945, about seveny-thirty or eight P. M. while claimant was driving his truck and trailer in a northerly direction over and along U. S. route 119, and about four miles

north of the city of Charleston, a huge rock or boulder broke from the hillside immediately adjacent to the said highway, striking and wrecking claimant's truck and causing some injuries to him personally. The hillside where the accident happened is almost perpendicular, is forty or fifty feet high, extending or sloping backward and upward for several hundred feet from the top or brink of the hill adjacent to the highway, and is composed of rock, shale and dirt. It is a dangerous place on the route in question and as shown by the evidence the road commission or its employees in charge of the maintenance of the said highway, realizing its dangerous condition, made periodical examinations of the hillside and slope to remove rocks or earth loose or likely to fall on the highway and to do all things necessary to make the highway safe for the traveling public. Such examination was made and work performed on the said hillside as late as December 29, 1944 or five or six weeks before the accident. In addition, the assistant highway superintendent of that district, who lives on the said route, passing this hillside almost daily and knowing of its condition, was, as he testified, always on the watch for any earth or rocks loose or likely to fall on the highway, and to take the necessary precautionary measures to make the highway safe. No evidence was introduced to show that the boulder that fell was loose and might fall or that an examination of the hillside would reveal the likelihood of its slipping from its place, falling to the highway and perhaps causing damage to a traveler thereon. On the contrary, so far as the evidence shows, the hillside, from the examination made shortly before the beginning of the year 1945, was considered reasonably safe and all loose dirt and rocks had apparently been removed. We held in the *Clark* case, referred to in the *syllabus*, as well as in the determination of other claims that "The state is not a guarantor of safety to the traveling public, since if it had such burden placed upon it the state as a whole might soon be bankrupt and unable to function as a commonwealth or as a *body politic*."

No negligence on the part of the state or the agency involved is shown. Accordingly an award is denied and the claim dismissed.

(No. 527—Claimant awarded $123.20)

CHARLESTON MAIL ASSOCIATION, Claimant.

v.

STATE HEALTH DEPARTMENT, Respondent.

Opinion filed May 3, 1946

As a general rule when the head of a state agency incurs an obligation on behalf of his department in performance of an administrative act, such indebtedness should be paid out of funds available for the purpose, in order that the state's credit be held inviolate.

Appearances:

Spillman, Thomas & Battle (W. V. Ross) for claimant;

W. Bryan Spillers, Assistant Attorney General, for the state.

MERRIMAN S. SMITH, JUDGE.

In January, 1945, Dr. A. L. Chapman, acting deputy commissioner of the state health department, at his office in Charleston, Kanawha county, West Virginia, ordered to be published, on January 24, 1945, a seven-point legislative program in the Charleston Daily Mail consisting of 88 column inches at the regular rate of $1.40 per column inch. This edition had a circulation of 58,000 in Charleston and throughout the state.

The bill, for $123.20, was rendered to the state health department, and was sent down to the auditor for payment in the usual form and due course, but payment was rejected on the grounds that it was making of *policy* by the state health department whereas the Legislature should make the policy and the department should execute that policy: and the auditor would like to know the reaction of the Legislature toward the payment of such an advertisement as this before giving it his approval.

The evidence showed that the Legislature adopted about half of the points set out in the advertisement among them being an increase in the salary of the health commissioner.

In my opinion the people should have knowledge *pro* and *con* on legislation proposed for the common good, since an enlightened electorate is more conducive to better laws under our form of government, and especially where increase in salaries for key positions are proposed it is better for the public to have advanced information disseminated through the press than for a handful of men in a smoke-filled room to lobby the enactment of such laws through the Legislature to the advantage or disadvantage, as the case may be, of an uninformed constituency.

In this instance the claimant acted in good faith, the acting health commissioner's program was endorsed by about seventy-five varied organizations, civic clubs and individuals throughout the state, and part of the program was enacted into law by the Legislature for the benefit of West Virginia citizens; consequently it was a just debt and should be paid.

And it appearing that the appropriation for the department for the biennium of 1943-1945, during which this claim arose, has lapsed, an award in the sum of one hundred twenty-three dollars and twenty cents ($123.20) is made.

(No. 495—Claimant awarded $1850.00)

THE BALTIMORE AND OHIO RAILROAD COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed May 8, 1946

As a sovereign commonwealth, the state of West Virginia should, in equity and good conscience, discharge and pay an obligation for which it is both morally and legally liable.

Ambler, McCluer & Davis (Fred L. Davis), for claimant;

W. Bryan Spillers, Assistant Attorney General, for the state.

ROBERT L. BLAND, JUDGE.

It appears from an agreed stipulation of facts that about four o'clock A. M. on the 9th day of February, 1945, Neal Riley, age thirty, residence Parkersburg, West Virginia, a yard-helper in the employ of the Baltimore and Ohio Railroad Company, was injured in the Fifth Street Coach Yard, Parkersburg, West Virginia, while riding a foot stirrup on the rear or southwest corner of baggage and mail car No. 273 of the railroad company; that while the said car was moving at a speed of about three or four miles an hour, and the said Neal Riley was on the southwest corner of the car as aforesaid, his head and body came in contact with a steel girder pier supporting an overhead highway traffic bridge, between Parkersburg, West Virginia and Belpre, Ohio; that there was a close clearance, to wit, 16 inches between the edge of the pier and side of the car and 13 inches between the edge of the pier and the center line of the grab iron at the point where the said Neal Riley was riding when the said accident occurred; that there were no defects in the foot stirrup or grab iron on the baggage and mail car which might have contributed to the accident; that Neal

Riley had been in the employ of the Railroad Company for about five or six months prior to the date of the accident, and had assisted in the switching of cars at that point on two prior occasions; that both of said prior trips were made during darkness; that there are lights, with shades, suspended from poles on goose-neck brackets, in the Fifth Street Coach Yard; that these lights are spaced approximately 50 feet distant from each other, which said lights were burning at the time of the accident, and afforded a certain amount of illumination; that the said Neal Riley sustained a contusion of the right hip, right flank and left shoulder, contusion and laceration right forehead, temporal region, complete fracture of the right transverse processes of the 1st, 2nd and 3rd lumbar vertebrae, and was admitted to the St. Joseph's hospital, in the city of Parkersburg, West Virginia, on the 9th day of February, 1945, and discharged from that instituion on the 16th day of February, 1945; that the said Neal Riley was unable to return to his usual employment with the railroad company until the 14th day of June, 1945, thereby losing 125 days, computed at $8.54 per day, amounting to $1,067.50; that by agreement bearing date on the 20th day of October, 1914, between the Baltimore and Ohio Railroad Company and the Parkersburg-Ohio Bridge Company, of record in the office of the clerk of the county court of Wood county, West Virginia, in deed book 165, page 255, the railroad company granted to the said bridge company the right to construct and maintain a bridge and the necessary supports therefor over the railroad and property of the railroad company at Fifth street, Parkersburg, West Virginia, upon certain terms and conditions, among which it is provided:

> "5. The Bridge Company shall assume and bear and indemnify the Railroad Company against all loss or damage which said Railroad Company or its employees or property may suffer on account of any accident caused by or in any way growing out of the construction, maintenance and operation of said bridge, whether the negligence of the employees of the Railroad Company contributes to said accident or not, and the Bridge Company shall assume and bear and indemnify the Railroad Company against any

injury to said bridge caused by the operation of trains.

". . .

"7. This agreement shall be binding upon and be for the benefit of the parties hereto, and their successors and assigns, and any railroad company operating over the tracks of the Railroad Company."

That at the time of the accident baggage and mail car No. 273 was being operated upon which is known as track No. 1 of the Baltimore and Ohio Railroad Company, Fifth Street Coach Yard; that track No. 1 was constructed some time prior to the building of the Fifth street bridge and was in its present location before and at the time of and subsequent to the construction of the said Fifth street bridge, and the location of said track No. 1 has not been changed since the building of the bridge; that the said bridge described in the agreement set forth in paragraph 3 was constructed by the Parkersburg-Ohio Bridge Company over the tracks and property of the Railroad Company at Fifth street, Parkersburg, West Virginia, and by successive conveyances has now become and is the property of the state of West Virginia, having acquired title to said bridge by deed bearing date on the 30th day of June, 1937, executed by David B. Crawford, *et al.* of record in the office of the clerk of the county court of Wood county, West Virginia, in deed book 217, page 209; that paragraph No. 4 in said deed provides as follows:

"(4) All the rights, privileges and franchises granted by The Baltimore and Ohio Railroad Company to the said Parkersburg-Ohio Bridge Company by contract dated October 20, 1914, recorded in Deed Book 165, Page 26 in the office of the Clerk of the County Court of Wood County, West Virginia, which rights, privileges and franchises were, after intermediate conveyances, conveyed by the Parkersburg Community Bridge Company to the said David B. Crawford and John M. Crawford by said deed of May 20, 1937, above referred to."

That on the 23rd day of March, 1945, and again on the 16th day of April 1945, letters were directed by the railroad

company to representatives of the state road commission of the state of West Virginia, who were in charge of the bridge referred to in the agreement in the preceding paragraph, advising them of the accident hereinbefore described, and asking for advice as to the handling of the claim which was then being made by the said Neal Riley; that there was some exchange of correspondence between the railroad company and the office of the attorney general of the state of West Virginia, and the state road commission, with the result that, by letter, bearing date on the fourth day of May, 1945, addressed to Mr. P. C. Garrott, general claim agent, The Baltimore and Ohio Railroad Company, Baltimore, Maryland, signed by Ralph M. Hiner, assistant attorney general of the state of West Virginia, the railroad company was advised that the state road commission could not be bound by the provisions in the said contract as aforesaid, and that the state of West Virginia would not appear in the defense of any action which the said Neal Riley might bring against the railroad company, and that the state would defend any action which might be brought against the state road commission, thereby refusing to comply with the provisions of paragraph 5 thereof; that the said Neal Riley employed George Sheldon, an attorney, practicing in the city of Parkersburg, West Virginia, for the purpose of filing a claim and, if necessary, the institution of a suit against the railroad company for damages for the injuries sustained by him in the above described accident, and after some negotiations between representatives of the claim department of the railroad company and attorney Sheldon, said claim of the said Neal Riley against the railroad company was settled for the sum of $1850.00, and a full and complete release was signed by the said Neal Riley on the 10th day of July, 1945, releasing the said railroad company and the state road commission of the state of West Virginia from any and all liability for injuries arising out of said accident; that the railroad company is prohibited by the terms and provisions of West Virginia constitution, article 6, section 35, and the judicial decisions of West Vrginia thereunder, from maintaining any action, either at law or in equity, against the state of West Virginia, the state road commissioner

of West Virginia, or the state road commission of West Virginia, for the enforcement of said contract or agreement, and therefore is obliged to proceed under chapter 20 of the acts of Legislature of West Virginia, for the year 1941, as found in Michie's 1943 West Virginia code, section 1143, *etc.*

Respondent contends that the state, its political subdivisions, agencies, agents or employees are without authority to enter into any contract or agreement imposing responsibility upon the state for the debts or liabilities of any county, city, township, corporation or person, by virtue of article 10, section 6 of the constitution of West Virginia; and that the state road commission was relieved of all liability in the premises when a full and complete release was signed by Neal Riley on June 10, 1945, releasing the railroad company and the state road commission of West Virginia from any and all liability for injuries arising out of the accident in question.

The railroad company contends that the contract dated October 20, 1914, which it entered into with the Parkersburg-Ohio Bridge Company, which, by its terms, is binding upon the parties thereto, their successors and assigns, should be honored by the state of West Virginia. It argues that said contract could be enforced in the courts of the state against any owner of the bridge except the state of West Virginia, which cannot be made defendant in a state court. The railroad company asks why should not the state in equity and good conscience discharge and pay an obligation solemnly entered into in writing on the 20th day of October, 1914, between it and the Parkersburg-Ohio Bridge Company, which obligation was binding upon the successors and assigns of the respective parties, when in fact the state of West Virginia is the successor and assign of the Parkersburg-Ohio Bridge Company. It argues that any person or corporation except a sovereign commonwealth that had become the successor and assign of the Parkersburg-Ohio Bridge Company would be bound by the agreement and would be obligated to honor its terms. It takes the position that when the agreement in question was entered into in 1914 the railroad company had a free, open and unobstructed passageway over

and along its various tracks in the Fifth Street Coach Yards in Parkersburg, West Virginia. It had a right to require this right of way to remain free, open and unobstructed. It had paid a valuable consideration for the privilege of laying its tracks in this Coach Yard. The Parkersburg-Ohio Bridge Company had no right to interfere in any way with the operation of locomotives and cars over and along these tracks. Realizing the exclusive right of the railroad to enjoy the free, open and unobstructed use of these tracks and further realizing that no bridge could be built over those tracks without first obtaining the written approval and consent of the railroad company, the agreement in question was negotiated and signed by the respective parties thereto. In the event the railroad company had seen fit to refuse to enter into this contract with the bridge company and the bridge had not been constructed over the railroad's tracks, this accident would not have happened.

It is manifest that the contract in question could not be enforced against the state in a court of law so long as it should see fit to rely upon its constitutional immunity. However, if the state were suable it would plainly follow that by reason of the conditions of the contract the claimant would be entitled to recover a verdict. The fact that Neal Riley executed a release of his claim to the road commission and to the railroad company could not militate against the right of the latter to be subrogated to the extent of the amount which it was obliged to pay in settlement of the claim. We are of opinion in view of the showing of the record that the settlement made by the railroad company with the claimant was fair, just and reasonable.

The contract, which is the basis of the claim, was not entered into by and between the railroad company and the road commission. Sections 5 and 7 contained in that contract would of course be objectionable and not allowed to be inserted in an agreement between the railroad company and the state. The contract was in existence when the road commission acquired title to the bridge property. The contract containing the sections referred to was of record in the office of the county court of Wood county where it could have been seen and inspected

by the road commission or any representative of the state. When the road commission took title to the bridge property it acquired such title subject in all respects to the terms, covenants and conditions contained in the original agreement. It would seem that the state of West Virginia would not want to repudiate an obligation which it voluntarily assumed. The railroad company divested itself of a valuable right when it permitted the bridge to be constructed over its tracks. The road commission is now in possession of the bridge, enjoying its benefits, and should not, in equity and good conscience, be permitted, under the circumstances existing in this case, to be relieved from complying with its obligations on account of its immunity from suit. The Legislature may, we think, if it sees fit so to do, assume responsibility for the payment of the claim in the instant case. In other words, the state as a sovereign commonwealth should, in equity and good conscience, discharge and pay an obligation for which it is both morally and legally liable.

An award is accordingly made in favor of claimant, The Baltimore and Ohio Railroad Company, for the sum of eighteen hundred and fifty dollars ($1850.00).

(No. 518—Claim denied)

EVA PETERS, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed May 8, 1946

CONTRIBUTORY NEGLIGENCE. In a claim for property damage wherein there is a collision on the highway and both parties to the accident fail to use ordinary care this court does not recognize comparative negligence and each party thereto is responsible for the damage to his automobile or truck.

Appearances:

Mohler, Peters & Snyder (Charles G. Peters), for claimant;

W. Bryan Spillers, Assistant Attorney General, for the state.

MERRIMAN S. SMITH, JUDGE.

This claim was heard as case No. 473-S at the January, 1946 term of court, under the shortened procedure provision of the court act, and an award was denied, whereupon a hearing under the regular procedure was granted by the court and the case was so docketed at the April, 1946, term.

The facts as set out in the opinion in case No. 473-S were as follows: The circumstances surrounding the accident for which damages are sought by claimant are that on the night of November 30, 1944, a snowplow and a truck owned and operated by the state road commission, going in opposite directions on the highway leading south from Union, Monroe county, West Virginia, stopped alongside each other blocking the highway. The snowplow was headed towards Union and the cinder truck headed south in the opposite direction. John Peters, son of claimant, who was driving south from Union, states that when approaching the two parked trucks that the

headlights on the snowplow so blinded him that he did not see the truck alongside, headed in the same direction he was traveling, so that he ran into the rear of the parked truck damaging the Chevrolet automobile. It was a windy and snowy night and visibility was low.

In the instant case all the records of the shortened procedure case were offered as a stipulation by both sides in this case, and the only additional evidence was that of Forrest Roles who had in the former case submitted, by letter, his version of the accident and known now as stipulation No. 7. On page 13 of the transcript Mr. Roles testified that Peters was driving at the rate of 20 miles or less per hour; this being the fact makes *a fortiori* in my opinion that Peters did not use ordinary care in driving the automobile under the physical conditions and was guilty of contributory negligence. In property damage claims where both parties are guilty of negligence there are no degrees of negligence and each party is responsible for his own negligence to his own vehicle, irrespective of the amount of damage.

Therefore, the denial of an award in the former case is hereby reaffirmed and an award is again denied.

(No. 522—Claimant awarded $550.00)

JAMES REYNOLDS, Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed May 8, 1946

A claim in which the facts adduced justify an additional payment to claimant for injuries received while employed as a laborer or janitor at Marshall College.

Appearances:

Cecil B. Dean, for claimant;

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

This claim arose by reason of an accident to the claimant while engaged as a janitor or laborer at Marshall College on September 13, 1945, and while claimant was replacing light bulbs in what is known as Laidley Hall of the said college. He was using a small two or three tread or step ladder to do the work and render the service of replacing the light bulbs, and, as he was about to descend, claims the ladder slipped causing him to fall to the hard floor and sustain severe bodily injuries. There were no rubber tips on the ladder to hold or keep it from slipping but the testimony is not conclusive as to whether this condition of the ladder caused the accident or brought about claimant's fall. It was not, however, what is known as a safety ladder, and had no protective appliances or attachments. Claimant is seventy-two years of age and seemingly rather frail and not very robust. The college had at the time not availed itself of the provisions of the workmen's compensation act, but has, since the accident, complied with the requirements of the said act, and any employee involved

in a similar accident happening now would undoubtedly be entitled to some compensation. Claimant has been paid approximately $400.00 by the board of control, his wages from the time of the accident to January 1, 1946.

Carefully reviewing the facts as presented to us and believing that the claimant's testimony preponderates in his favor, we are of the opinion that the state or agency involved is morally bound to pay some compensation to him, somewhat commensurate with the allowance that would have been made if the college at the time of the accident had already availed itself of the provisions of the workmen's compensation act. Taking into consideration that claimant has already been paid the sum of approximately $400.00 we feel he is entitled to an additional payment of five hundred and fifty dollars ($550.00) and recommend an award accordingly in that sum.

ROBERT L. BLAND, JUDGE, dissenting.

Prior to September 13, 1945, Marshall College, a state educational institution at Huntington, had not complied with the statute which requires the state of West Virginia and all governmental agencies or departments created by it to subscribe to, and pay premiums into the workmen's compensation fund for the protection of their employees, and be subject to all requirements of said statute, and all rules and regulations prescribed by the commissioner with reference to rates, classification and premium payments. On the contrary, the institution had, on its own initiative, paid for injuries sustained by workmen in line of duty until some months ago the state auditor, always alert to the protection of the public revenues, refused to authorize any charge for medical services and hospital services and thereupon the college immediately took steps to come under the workmn's compnsation act.

On the said 13th day of September, 1945, claimant, James Reynolds, a roustabout and janitor at the college had occasion to install an electric light bulb in Laidley Hall. For the purpose of doing so he used a small ladder, about two feet in

height, and consisting of three steps. He had installed the bulb. When he attempted to descend and placed his foot on the second step he slipped and fell to the floor. As a result of the fall he sustained a fracture of the right hip just below the angulation of the socket. He incurred expenses of approximately $529.50. In this case he seeks damages in the amount of $5000.00. From the time of his accident until the 1st day of January, 1946, he was paid by the college his salary at the rate of $105.00 a month. By a majority of the court he is given an award of $550.00.

I do not think that under the facts disclosed by the record an award should be made in any amount. The state is not bound to compensate an individual employee for injuries sustained while in its service, and no right of recovery in favor of such employee exists by inference or legal construction, or otherwise than by statute. 49 Am. Jur., Section 73, at page 284. The award made would, in my opinion, be a mere gratuity. If ratified by the Legislature it would authorize an appropriation of the public revenues of the state for a purely private purpose. This court has no jurisdiction in workmen's compensation cases. Such jurisdiction is expressly excluded by subsection 4 of section 14 of the Court Act. There is a difference between relief which may be afforded under chapter 23 of the code, being the workmen's compensation statute, and awards which may be made by the Court of Claims. One may qualify for relief under the workmen's compensation statute when he would not be entitled to an award in the Court of Claims. If the Legislature had intended this court to make awards under circumstances calling for relief in workmen's compensation cases it would not have excluded such jurisdiction in the Court Act.

I do not think that upon the merits of the instant case the claimant has shown himself to be entitled to an approved claim. I think his injuries were the result of his own carelessness. The ladder which he used in installing the electric light bulb, consisting as above stated of three steps, was exhibited to and inspected by the members of the court. The writer of this statement stepped safely upon each of the three steps of the small

ladder and it did not wobble. H. O. Clark, superintendent of buildings and grounds at the Huntington institution, testified that he weighs 187 pounds and that the ladder did not wobble when he stepped upon it. If the award made shall be ratified claimant will have received his salary at the rate of $105.00 a month for three and one-half months, plus the amount of the award, namely, $550.00, as a reward for falling off a step not more than eighteen inches from the floor. I can and do sympathize with him for the injury which he sustained as a result of the fall and for the pain which he has endured in consequence thereof, but I cannot concur in an award made on what I conceive to be purely a sentimental ground. The door of the court of claims should be closed to purely sentimental claims.

(No. 515—Claimant awarded $2500.00 upon rehearing)

DAVIS TRUST COMPANY, Adm. of the estate of LUCY WARD, deceased, Claimant,

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed May 8, 1946

Inexcusable laxity in the handling and guarding of prisoners committed to the state penitentiary, under circumstances as presented in the prosecution of this claim, constitutes negligence on the part of the prison officials, and if such negligence is the cause of a crime committed by a prisoner against a citizen, whereby such citizen, or his estate, suffers damage, an award will be made.

Appearances:

Brown & Higginbotham, for claimant;

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

The Davis Trust Company, of Elkins, West Virginia, as administrator of the estate of Lucy Ward, deceased, prosecutes

this claim on the ground of inexcusable laxity, amounting to negligence, on the part of the prison officials in charge of the state medium security prison at Huttonsville, West Virginia, in guarding and handling the prisoners of said prison, one of whom, James Chambers, on January 20, 1945, raped and murdered the said Lacy Ward, a highly respected lady, living on a farm near the said prison. The said rape and murder took place in the barn on the farm about nine o'clock A. M., and thereafter Chambers returned to the prison without the prison authorities even knowing that he had been off the prison premises or grounds.

In this all-important claim, a careful review of the testimony is necessary to fully determine whether the prison officials were so lax in guarding the prisoner, Chambers, as to be guilty of such negligence as might reasonably lead to the commission of the crime or crimes for which Chambers was subsequently convicted and later hanged at the Moundsville prison.

The record, made up mostly of agreed stipulations and the report of the legislative committee on *penitentiary* made to the regular session 1945 of the West Virginia Legislature after investigating conditions at the Huttonsville prison, sets forth in minute detail the facts presented to us for our determination.

Chambers (colored), a life-term prisoner at the time of the Lucy Ward murder, on the first day of April, 1935, killed and murdered, by cutting her throat with a razor, one Mabel McIntyre, a colored woman, the mother of a young colored girl to whom Chambers had been paying some attentions, and to which actions her mother had seemingly been objecting. This crime took place in Wyoming county and subsequently Chambers was tried and convicted of first degree murder, with a recommendation of mercy, and thereupon sentenced to life imprisonment in the penitentiary at Moundsville. Early in the year 1941 he attacked with a knife one Ethel Goodman, also an inmate of the prison, and cut or stabbed her on the hip. Later he was found in the said Ethel Goodman's bath room, she at the time being employed in the Warden's apartment, was

tried for this misconduct by the prison court and sentenced or placed on "red and white" indefinitely, which, as explained by the prison clerk, means confinement to his cell and two meals a day. He was so confined for a period of about sixty days. Thereafter, while working on a prison road gang, he attacked a fellow prisoner with a knife, and was later transferred to the Huttonsville prison where he remained until he committed the crime for which this claim is presented.

The report of the legislative committee on *penitentiary* which investigated conditions at the Huttonsville prison shortly after the Ward murder, reported, among other things, that Chambers left the institution and farm on January 20, 1945, going to the nearby Ward farm, raped and murdered Lucy Ward and returned to the prison without his absence ever being known by the prison officials; that the prisoners were allowed to visit neighboring farms, springs and orchards of their own free will and without guards; that prisoners attempted to rape other women in the vicinity of the prison, and that the officials did nothing when such conduct was reported to them; that prisoners were arrested some distance from the prison for fishing without licenses and that they were found so engaged as late as ten o'clock at night; that prisoners were in possession of keys to gas tanks and other outside buildings: that the knife with which Miss Ward was slain was one apparently taken from the prison, and that a general laxity of discipline was evident, and that no proper check of prisoners was made. Under such conditions and lax discipline Chambers had been serving his life sentence from July 27, 1944, the date of his assignment to Huttonsville, until January 20, 1945, a period of six months, when he committed the Ward murder.

It requires no stretch of the imagination to reach the conclussion that had the proper precautions been taken by the officials and had the handling and governing of prisoners been such as the conditions and circumstances required, the brutal and dastardly crime, which is the basis of this claim, might never have been committed. Chambers was a desperate criminal, not only outside the prisons, but inside of them as well. He was a fiend

when in possession of a knife or razor. We have the right to assume from the facts before us that his record from the time he committed the murder in Wyoming county to the time of his transfer to the Huttonsville prison was fully known by the proper officials, and having known his record, it was an abuse of discretion and judgment to allow his transfer; this fact, coupled with the general laxity of discipline at Huttonsville, the general disregard for the safety and security of citizens and residents from attack by uncontrolled and ungoverned prisoners confined there, and the unwarranted and improper assigment of Chambers to Huttonsville constitute negligence for which the state is morally bound to make amends.

No mere financial award can restore the life of the victim of the tragedy involved, nor heal the wounds of those who were near and dear to her. However, we feel that the state, as such, should not be unnecessarily penalized for the acts and conduct of the officials referred to, and are therefore of the opinion that an award of $3500.00 should be made, and which we believe would have the desired effect for the future conduct of the prisons in question. An award of thirty-five hundred dollars ($3500.00) is accordingly made, payable to the claimant as administrator of the Lucy Ward estate.

MERRIMAN S. SMITH, JUDGE, concurring in part.

While I agree with the conclusion reached in the opinion as filed by Judge Schuck so far as an award is concerned, yet I feel that in view of the circumtsances and facts here presented the amount of the award should be left open for the further consideration of the Legislature.

ROBERT L. BLAND, JUDGE, dissenting.

Fully recognizing the atrocity of the crimes of the convict James Chambers and the laxity of discipline maintained at the Huttonsville medium security prison I am nevertheless constrained to oppose a recommendation for an appropriation of the public funds in this case.

It is doubtful, to say the least, whether the Legislature in creating the Court of Claims had in mind or contemplated the filing and prosecution of a claim of the character such as the one under consideration. From time to time claims against the state must necessarily arise for the payment of which it would be eminently proper for the Legislature to make appropriations within the limitations of its powers, since the purpose of the Court Act is to provide a simple and expeditious method for the consideration of such claims which because of the provisions of section 35, aritcle 6 of the constitution of the state and of statutory restrictions, inhibitions or limitations cannot be determined in a court of law or equity. The jurisdiction conferred upon the court is limited, I think, to demands resting upon legal basis. "Claim" is defined to be "a demand of a right or alleged right; a calling on another for something due or alleged to be due; as, a claim of wages for services." Century Dictionary. No liability against the state was created by the Court of Claims Act where no liability existed before its enactment. If the state were suable the instant claim could not be maintained; such a claim is against public policy. By reason of the inhibitions against suit contained in the constitution of West Virginia our state is incapable of giving its consent to be sued, wherefore for the consideration of proper and meritorious claims against the sovereign power the State Court of Claims owes its origin as a special instrumentality of the Legislature where all such claims are finally passed upon and adjudicated. In a jurisdiction where consent to be sued may be given the state does nothing more than waive its immunity from action. *Smith* v. *State,* 227 New York 405; 125 N. E. 841; 13 ALR 1264. It does not thereby concede its liability in favor of the claimant or create a cause of action in his favor which did not theretofore exist. *Davis* v. *State,* 30 Idaho 137; 163 Pacific 373; Ann. Cases 1918-D, 911.

It is the peculiar function of the Court of Claims to assist the Legislature in its consideration of all claims asserted against the state. It is important to know whether the legislative body

desires the court to be guided by law or to make recommendations according to the respective reactions of its members. In 49 American Jurisprudence under the title *Liability of State and State Officers,* Section 73, page 284, this enlightening information is stated:

> "The liability of a state in its ordinary affairs is somewhat different from that of a private individual. Under ordinary circumstances, it can sustain a liability only by reason of a contractual obligation. It is not liable for the tortious acts of its officers. And where a governmental duty rests upon a state or any of its instrumentalities, there is absolute immunity in respect to all acts or agencies. There is no moral obligation upon the part of the state which can be enforced upon equitable principles alone. The state is not liable as an individual or private corporation may be on the ground that its agent acted upon an apparent authority which was not real. It is not bound to compensate an individual employee for injuries sustained while in its service, and no right of recovery in favor of such employee exists by inference or legal construction, or otherwise than by statute. It is not the policy of states to indemnify persons for loss, either from lack of proper laws or administrative provisions, or from inadequate enforcement of laws or the inefficient administration of provisions which have been made for the protection of persons and property . . . "

And in Section 76 of the same volume, under the title *For Torts of Officers,* this universally accepted rule is stated:

> "The rule is well settled that the state, unless it has assumed such liability by constitutional mandate or legislative enactment, is not liable for injuries arising from the negligent or other tortious acts or conduct of any of its officers, agents, or servants, committed in the performance of their duties. In other words, the doctrine of respondeat superior does not apply to sovereign states unless through their legislative departments they assume such liability voluntarily.

"While there is authority to the contrary, the general rule is that the exemption of the state from liability for torts of its officers and agents does not depend upon the state's immunity from suit without its consent, but rests upon grounds of public policy which deny the liability of the state for such damages. It is based upon the sovereign character of the state and its agencies, and the absence of obligations on the part either of the state or such agencies, and not upon the ground that no remedy has been provided. Under this general rule a state is not answerable in damages for injuries sustained by, or the death of, a convict in prison through the negligence of the prison officers, in the absence of any voluntary assumption of liability.

"The distinction recognized in municipal law, in determining the liability of municipal corporations for tort, between acts and duties which are strictly public and governmental in their nature and those which are of a private or proprietary nature does not appear to control the question of liability of the state for tort. The rule of nonliability of the state for torts of its officers, although often stated in terms indicating it to be a rule of nonliability when the officer is exercising a governmental function, does not appear to be limited to cases where the act of the officer or agent occurred in the discharge of some purely governmental function of the state."

In the case of *Allen* v. *Board of State Auditors*, 122 Mich 324, it is held that:

"A petition for compensation by a citizen who served a term in prison for a crime of which, it is alleged, he was innocent is not a 'claim' which the board of state auditors may be authorized to pass upon under article 8, section 4 of the Constitution, creating such board 'to examine and adjust all claims against the state;' claims, within the meaning of such provision, embracing only demands based on legal grounds."

In *Riddoch* v. *State*, 68 Wash. 329; 123 Pacific 450; Am. & Eng. Annotated Cases, Vol. 30, page 1033, it is held;

> "In the absence of voluntary assumption of the obligation, the state is not liable for the torts or negligence of its officers or agents; and this applies to personal injuries to a spectator, sustained through a defective railing in a state armory, negligently constructed by a state commission created for the purpose, and leased for a compensation to private parties by the state officer in charge of it for the purpose of giving a public exhibition: since the state's immunity from liability is not confined to the discharge of purely governmental functions of the state, the sovereignty of the state extending to any private enterprise taken over or administered by the state."

In the opinion in the above case, Judge Ellis says:

> "The doctrine that a sovereign state is not liable for the misfeasance, malfeasance, nonfeasance or negligence of its officers, agents or servants, unless it has voluntarily assumed such liabili'y, is established by authority so cogent and uniform that isolated expressions which might be construed as tending to the contrary are negligible."

The rule of a state's nonliability for torts is stated by the United States Supreme Court in *Robertson* v. *Sichel*, 127 U. S. 507, 515; 8 S. Ct. 1286; 32 U. S. (L. ed.) 203, as follows:

> "The government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public servcie; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassmets, and difficulties, and losses, which would be subversive of the public interests. Story on Agency, Sec. 319; *Seymour* v. *Van Slyck*, 8 Wend. 403, 422; *United States* v. *Kirkpatrick*, 9 Wheat, 720, 735; *Gibbons* v. *United States*, 8 Wall, 269; *Whitside* v. *United*

States, 93 U. S. 247, 257; *Hart* v. *United States,* 95 U. S. 316, 318; *Moffat* v. *United States,* 112 U. S. 24, 31; *Schmalz's Case,* 4 C. Cl. 142."

I do not think that the instant claim is one that may be properly prosecuted against the state; but I realize that the state, through its Legislature alone, has the sovereign power to waive its immunity from liability for torts. I do not think, however, that the mere ratificaion of an award made by the Court of Claims amounts to a voluntary assumption of liability. On the contrary, I am impressed by the thought that a voluntary assumption of liability for the torts of its officers, agents or servants must be made by the enactment of an express statute.

After an experience of approximately five years on the Court of Claims I am more and more persuaded that every claim should be determined upon the basis of its own facts.

I think that the attempted award made in the instant case is abortive and futile. Under the Court Act two members of the court have the power to make or deny an award. In the case under consideration one member favors an award of $3500.00 and another would leave the determination of the amount of the award to the Legislature. Thus, majority members of the court are not in agreement on the question of the amount of the award which they would make in favor of claimant. An award like a judgment should be definite and certain. An award is, I think, the final consideration and determination of the court. When two members of the court who would favor an award are in disagreement as to the amount thereof, how can it be said that an award has been actually made? The majority opinion is vague, indefinite and uncertain as to what was actually done by the court in its determination of the case.

The Legislature has a special legislative report before it as to conditions at the medium security prison at Huttonsville. If the Legislature shall desire to correct conditions prevailing there it has all the information it may need in that report and I do not see that the Court of Claims is concerned about such condi-

tions. Its concern is to determine whether or not the public revenues of the state should be appropriated in satisfaction of the claim in question. It does not behoove the court to "penalize" the state in any amount.

CHARLES J. SCHUCK, JUDGE, upon petition for rehearing.

The petition of the state board of control heretofore filed in the above claim, seeks a reconsideration by the court of the evidence heretofore adduced at the previous hearing, and bases its application on the following reasons, to wit:

1. One member of the court favored an award of $3500.00;

2. Another member of the court was of an opinion that the amount of the award should be left open for the further consideration of the Legislature, and;

3. Another member of the court favored the denial of an award.

No other or additional testimony is offered or presented.

Reviewing again the record before us and giving consideration to the arguments now presented by counsel upon the application for reconsideration, a majority of the court reaffirms its former opinion and holds that the state or agency involved is morally bound to compensate the estate of the deceased Lucy Ward, and after mature consideration we fix the amount of the said award in the sum of twenty-five hundred dollars ($2500.00) and recommend to the Legislature payment accordingly.

ROBERT L. BLAND, JUDGE, dissenting.

For reasons set forth in my former dissenting opinion filed in this case, I dissent to the award now made in favor of the claimant by a majority of the court. Atrocious as the crime of the convict Chambers is shown to have been, he was promptly tried, convicted and hanged for his henious offenses; he made full atonement for his crimes. No award of this court, how-

ever, large the amount might be, could be of any benefit to his unfortunate victim. Her only heirs-at-law are one brother and one sister, both more than three score and ten years of age. It cannot be argued, in view of general law, that the state is under any obligation, moral or otherwise, to respond in damages for Miss Ward's death.

I reaffirm that in my judgment the award is improper and against public policy.

(No. 517-S—Claimant awarded $450.00)

JAMES G. LANHAM, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed May 8, 1946

ROBERT L. BLAND, JUDGE.

In 1937 the state road commission made a change in the location of the highway known as U. S. route No. 250, about six miles east of the city of Fairmont, in Marion county, West Virginia. In the course of grading, paving and otherwise improving said road, a deep cut was made through a tract or parcel of land, the surface of which was owned by Oscar Little. The road commission obtained a deed from said Little for the right to make said change in said location of said road. The said deed is recorded in the office of the clerk of the county court of said Marion county in deed book 332 at page 203. The land owned by Little was formerly owned by claimant James Lanham. When Lanham conveyed to Little he excepted and reserved one-half interest in the Pittsburgh vein or seam of coal on said land, with necessary mining rights to mine and remove the same. Lanham had the coal so reserved properly entered for taxation and has regularly paid the taxes

thereon. He has made no conveyance of any part or interest in the coal reserved and is the owner thereof at the present time. The road commission paid Little, the owner of the surface and one-half interest in the coal, the sum of $900.00 for the right of way executed by him and for damages. No title was secured by the state from Lanham.

Claimant Lanham made a claim against the road commission for 4,500 tons of coal taken from the land in the course of the work done on the highway. A survey was made by engineers of the road commission to determine whether or not the number of tons claimed by Lanham was correct. The reports of the engineers show that there was approximately 5,500 tons of coal removed. They agree that 4,500 tons is a fair estimate.

The road commission agreed to pay claimant, in full settlement of his demand, the sum of $450.00. He accepted the proposition. The state road commission therefore concurs in Lanham's claim for that amount. An assistant attorney general approves the setlement. We are of opinion from the showing made by the record that the claim is just and meritorious.

It appears from the record of the case that out of appropriation heretofore made by the Legislature there is money to the credit of the road commission available for the payment of the claim.

An award is therefore now made in favor of claimant, James G. Lanham, for the sum of four hundred and fifty dollars ($450.00), payable out of the appropriation made for the state road commission for the current biennium.

(No. 502—Claim denied)

PETER SECHINI and ALICE J. SECHINI, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed May 9, 1946

LATERAL SUPPORT. In a cause of action for damages caused by removal of lateral support, an award will be denied where the physical conditions show that the state excavated entirely within its right of way and that the slipping and cracking of dirt on adjacent property was caused by filled-in dirt and the virgin soil was not molested by any excavation on the state's property.

Appearances:

Gilbert S. Bachmann, for claimants:

W. Bryan Spillers, Assistant Attorney General, for the state.

MERRIMAN S. SMITH, JUDGE.

In 1929 claimants built a story and one-half stucco dwelling on two lots on a slope adjoining the north side of the right of way of the national road in Liberty district, Ohio county, West Virginia, near the Pennsylvania state line. In 1941 the state road commission widened the highway from 18 feet to 22 feet and dug a ditch about 1½ feet deep alongside the berm, which was about 8 feet wide, in front of the claimants' property. The front porch has pulled away from the house and there are breaks in the porch pillars, cracks in the flagstone walk and tilting of two willow trees in the front yard, in addition to three or four cracks running parallel across the lawn, for all of which the claimants are seeking damages to the extent of $2500.00.

The members of the court made a personal inspection of the property and the majority of the court found that neither

the center line or the grade of the highway was changed when it was widened about 4 feet in 1940-41; that the right of way extends 33 feet from the center of the road on each side; that the ditch was about 12 feet from the right of way line and that of claimants' property.

When the house was built excavation was made for a full-size basement and for a coal bin under the porch and the dirt was thrown out in front to fill in the lawn. About a year after the house was built one Mr. Slater testified that he was employed to grade and sod the lawn. At this time there was a crack in the loose soil so he put a used telephone pole about 25 feet long in a horizontal position at the bottom of the loose or filled-in dirt, and placed five posts in a vertical position to hold the pole in position and to keep the filled-in dirt from slipping. About ten feet from the Sechini's west property line the road commission did excavate practically to the right of way line in order to put in a culvert to carry off the water from the ditch, and upon personal observation there is no cracking or slipping of the native soil on this adjoining lot. After a careful inspection of the property and due consideration to all the testimony, the majority opinion of this court is that the work done by the state in 1941 did not impair in any way the lateral support of the adjoining property of the claimants, and that whatever damage was sustained by them is due solely to the slipping and settling of the filled-in dirt deposited on the native soil in levelling and grading of the slope for the lawn.

Any claim for damage or an award is denied by majority members of this court and due deference is taken to the views of Judge Schuck, who will file a dissenting opinion.

CHARLES J. SCHUCK, JUDGE, dissenting.

I cannot agree with the conclusion reached by the majority of the court in this case, since the evidence in my judgment, does not sustain the proposition that the slipping of the earth and the cracking of the porch attached to the house was caused

by filled-in dirt as maintained during the course of the hearing by the respondent. The testimony offered to sustain this theory was, in my judgment, lamentably weak, and in some instances not worthy of consideration, since the resident engineer himself, who was the principal witness in suport of the theory in question, had to admit that the blueprints which he introduced to sustain his contention did not bear out his theory of the case, and his testimony with reference to logs and grass decaying ten years after the house in question was built was so highly improbable as to make this part of his testimony unworthy of serious consideration.

The home of the claimants was built in 1929, and the uncontradicted testimony of the witnesses is that up to the year 1941, at which time the national road was widened and the excavation complained of took place, no defect or cracks of any kind had been shown either in the porch or the house and that shortly after the said changes in the national road, the damages to the property in question took place. This physical fact stands out as an uncontradicted feature that is so strong and convincing as to compel me to reach a conclusion contrary to that maintained by the majority. Independently of all other testimony, this physical fact in bold relief, points the way to the proper solution of the issues here involved. I repeat that the testimony of the resident engineer, to the effect that logs and slipping grass and dirt that was put upon the adjacent property from the excavation for the cellar and basement of the house caused the damage complained of, is too far fetched, as shown by his own testimony and not supported by the outstanding fact just referred to; on the other hand, a reputable engineer who testified for the claimant gave it as his opinion, without qualification, that the work done by the respondent at the time that the road was widened and somewhat changed in the year 1941, was undoubtedly the cause of the damage to the property for which this claim is now presented.

In view of these conditions and deductions, I am unable to agree with the majority opinion and therefore dissent. In my judgment an award should be made.

(No. 524—Claim denied)

EMMA QUICK, MILDRED MILLER and HARRY MILLER, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed June 17, 1946

Where the testimony shows that a farm or land was benefited by a road construction and improvement rather than damaged, an award, of course, will be denied.

Appearances:

Ralph H. Smith, for the claimants;

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimants maintain that by reason of the construction of a bridge or viaduct over and upon their farm or property, located in Wirt county, West Virginia, their land and house were flooded by what the testimony shows to have been an unusual cloudburst. They claim damages in the amount of approximately $1500.00, and accordingly ask an award at the hands of this court. A further question was also presented, namely, the matter of the construction of a certain pipe that took care of the water flowing from a small spring or stream on the adjacent hillside, the claimants maintaining that this pipe was so constructed that it failed to carry off the water from the said spring, and consequently caused a marsh or swampy condition which lessened the value of the land.

At the time that this improvement was contemplated the state road commission obained a deed, dated June 1, 1940, for

the right-of-way across the lands of claimants, and which deed contained the following closing paragraph:

> "The said party of the first part, in consid eration of the benefits received and to be received by reason of the construction or improvement of said road, hereby waives all claim for damage to residue of property growing out of such construction or improvement."

The claimant Emma Quick maintains that she never had this part of the deed read to her, yet she signed the same and acknowledged it, and the deed had been read to her by a neighbor as well as by one of the road agents. While this provision might well prevent any recovery for damages and would perhaps under ordinary conditions be conclusive, yet we have nevertheless given consideration to all the testimony as presented. On their own initiative the members of the court took a view of the premises in order to fully acquaint themselves with the conditions prevailing, and that justice might be done as between the claimants and respondent.

The testimony of the road commission's engineer is to the effect that the bridge complained of had been built in accordance with the scientific formulae of the United States Geodetic Survey, and the outlet under the bridge for the passage of water even made larger than required by the said surveys. The testimony further shows that the property in question was as a whole assessed at $550.00, and the testimony of a neighbor was to the effecc that in his judgment, the whole property was at no time worth more than $600.00. The view heretofore referred to and made by the court sustained this testimony as to values. There is but comparatively little bottom land probably several acres, which would have any value, the remaining part of the farm being hilly and mountainous.

As heretofore referred to, complaint was also made that the drainpipe carrying the stream from the hillside was not properly constructed, but an examination shows that the drain in question was one over which the respondent had no control, being entirely on claimants' property, except where it came to the con-

struction of the new road and that no damage could possibly have been caused by this construction and if there was, it must have been occasioned by claimants' lack of care in draining and cleaning the spring or stream in question. We are persuaded that the new road improves the property rather than lessens its value, and that consequently there was no such injury by reason of this unusual rainfall as would entitle claimants to an award. The house in question was of very cheap construction and could not possibly have been damaged to the extent claimants allege. All in all, we are of the opinion that the property has been benefitted rather than damaged and an award is denied.

(Nos. 503-504-505-506-507—Claims denied)

B. F. DARLINGTON, MARGARET DARLINGTON, and MARGARET ANN DARLINGTON, an infant; WILLIAM WARD and NANCY LYNN WARD, an infant,
Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed June 17, 1946

Where an employee of the state, having established headquarters for seven days in the week, after work hours on Saturday evening while enroute to his home to spend the week end with his family, is not in the furtherance of his employer's business, nor does he in any way directly or indirectly promote the welfare of his employer's business; under the evidence in these cases awards will be denied.

Rummel, Blagg and *Stone (M. Harper Mauzy)* for claimants;

W. Bryan Spillers, Assistant Attorney General, for respondent.

MERRIMAN S. SMITH, JUDGE.

These five claimants filed their several claims against the state road commission for damages growing out of the same auto-

mobile accident, each claim being for a specific amount. Since the facts and circumstances surrounding the accident are the same the said several claims are combined and heard together.

On Saturday, July 14, 1945, Dewey Taylor, party chief of a surveying crew of the state road commission, together with six other men, had been working below Liverpool and Sandyville, about fifteen miles from their headquarters at Ripley. At noon, on that day, they discontinued work for the week and returned to Ripley for lunch. Since it was Saturday that was considered the workday. After lunch Taylor repaired to his room at the hotel in Ripley and checked his notes. He testified that this work required two or three hours. (Record p. 190). He and Walker and Triplett then drove to Spencer, about twenty-five miles from Ripley, in a state station wagon. While at Spencer, Taylor made arrangements at the Spencer-Roane Hotel with the manager, Margaret E. Lockhart, for the following week for lodging and meals for himself and his crew, since they were to change their headquarters from Ripley. About six o'clock P. M., instead of returning to their headquarters at Ripley, Taylor with Walker and Triplett, proceeded to drive to their home at Walton. John Walker was at the wheel when they left Spencer. Upon reaching the suburbs of the town, the station wagon sideswiped a parked automobile belonging to Mr. William S. Ryan, then prosecuting attorney for Roane county. After this occurrence Taylor took over the wheel. When he had driven about twelve miles and while rounding a curve he crossed the center line of the highway on his left and ran head on into a Chevrolet pick-up truck owed by claimant Margaret Darlington, and driven by her husband, claimant B. F. Darlington, causing the accident for which these claims for damages are sought. The accident occurred about two miles from Walton, in Roane county, on route 119, between six and seven o'clock in the evening.

From the time that Taylor left Spencer, he elected to be on his own business and was in no way acting within the scope of his employment by the state road commission. As above stated, his headquarters were at Ripley, where the state had

provided for his room and sustenance and his going home at Walton was for his own benefit, comfort, and pleasure. No one understood more clearly than Taylor himself that he was on his own business since he had imbibed in strong drink and was under the influence of liquor. While on his way to his home he permitted Walker, without a license, to drive the station wagon and he himself drove it while in a state of intoxication. It is made clear by the evidence that while thus on his way to his home at Walton, Taylor was in no manner engaged within the scope of his employment for the state road commission.

While it is clear that Taylor might be personally liable to the claimants, the evidence is insufficient to warrant or justify responsible for the happening of the accident.

It is our opinion that the compensation commission erred in awarding compensation to Walker since neither Taylor, Walker nor Triplett were in the furtherance of their employer's awards to them against the state. The state is in no way business nor within the scope of their employment, nor in any way were they promoting the business of the state at the time of this unfortunate accident.

Awards are, therefore, denied by a majority of the court, and the claims dismissed.

ROBERT L. BLAND, JUDGE, Concurring.

These cases are prosecuted upon the theory that the state road commission as principal, through Taylor, as agent, committed the tort which caused the damages for which awards are sought, in the total sum of $17,250.00. While I steadfastly maintain that in the absence of voluntary assumption of liability, the state is not liable for the torts or negligence of its officers or agents, the doctrine of *respondeat superior* not being applicable to the state, nevertheless, upon the issues tendered by the record I am fully in accord with the views expressed in the majority opinion written by Judge Smith. It is only when acts done by command or while within the scope of em-

ployment that a principal or master is responsible for the acts of his agent or servant. That situation does not exist in these cases. It is generally understood that the principal is not responsible for the acts of his agent not within the scope of the employment.

In *Clark* v. *Buckmobile Company*, 107 App. Div. 120, 94 New York Supp. 771, it is held that in an action brought to recover damages for personal injuries sustained by the plaintiff in consequence of being struck by an automobile owned by the defendant, the fact that the persons in charge of the automobile at the time of the accident were employees of the defendant does not render the defendant responsible for their negligent acts unless they were then engaged in the defendant's business.

Whether or not the road commission, an agency of the state, is responsible for damages sustained by the claimants by the negligence of Taylor rests upon and must be determined by the inquiry as to whether or not Taylor, at the time of the accident, was acting as agent or employee of the road commission within the scope of his employment.

Although the evidence shows that Taylor was an employee of the state road commission it does not show that at the time of the accident he was acting within the scope of his employment. It is not sufficient to show agency only. It is necessary to show connection of the accident with the employment, which has not been done.

Taylor was employed in the survey department of the state road commission. He was in charge of a crew of seven persons, including himself, whose duties were chiefly in the field. He was designated as party chief or chief of the crew. He was a transit-man, anyone in charge of the survey party having the title of chief of the party. The party ran elevations and made cross-sections. Taylor went to work for the commission in 1927, and left its employ between 1941 and 1942. He was reemployed in 1943. When Taylor reentered the employment of the road commission and was assigned to a project,

a station wagon which had been obtained from the Army and fitted for field work was placed at his service for such work. For a period of approximately two months the crew had headquarters at Parkersburg. After the completion of that job it began work in another section, between Sandyville, West Virginia, and Liverpool, Ohio, having headquarters at Ripley, in Jackson county. On Saturday, July 14, 1945, the crew quit work about twelve o'clock noon. Its members went to the hotel at Ripley. While there Taylor checked his notes, the work requiring something like an hour. He also went out to a hardware store for the purpose of purchasing some sandpaper for an old gentleman who was finishing a gunstock for him, this action not being in any way connected with his employment by the road commission. From Ripley, Taylor and others went to Spencer, in Roane county, where he arranged at a hotel for lodging for members of his crew during the following week. After this he started in the station wagon, which he used in the field, for his home at Walton. When he left Spencer the vehicle was driven by John Louis Walker, a member of his crew. Later Taylor took the wheel of the station wagon. When within two and one-half miles north of Walton, Taylor collided with a motor vehicle in which the claimants were driving. He was intoxicated at the time. Walker was injured in the collision and later received compensation from the workmen's compensation fund; compensation, by the way as shown by the record, which would not have been paid if the true facts had been certified and known by the department.

It is shown by the testimony of L. C. Madden, engineer of plans and surveys, who had overall supervision of Taylor and his crew, that no permission or consent was at any time given to Taylor to use the station wagon in going to his home at Walton on week ends. His use of the station wagon was confined and limited to the field work which he was employed to do for the road commission.

It is manifest from the evidence that at the time of the accident Taylor had finished his work for the road commission for

the week and was on his way to his home at Walton, where Walker also resided. He was about his private business. He was on his own personal business, in no way connected with the business of the road commission, and, cosequently, was not at the time of the accident acting as agent of the road commission, nor in the scope of his employment. He was not in any respect acting under orders of the road commission. He was not performing any service for the state, being merely on his way to his home.

> "Where the chauffeur commits injury while driving for himself his employer is not liable." Huddy on Automobiles, Section 284, 4th Ed.

Tested by recognized authority of law claimants have failed to show that they are entitled to awards in these cases. Lamentable as the accident is shown to have been, it would be a miscarriage of justice to recommend an appropriation of the public revenues by way of awards. The interests of the taxpayers cannot be overlooked.

CHARLES J. SCHUCK, JUDGE, dissenting.

The question involved in the issue presented for our consideration and determination and as shown by the majority opinion is, of course, whether or not Dewey Taylor, the state road employee in charge of the station wagon which collided with claimant's truck and brought about the injuries in question, was at the time of the collision acting within the scope of his employment. That he was grossly negligent in causing the accident, and that none of the claimants were guilty of any contributory negligence is in fact admitted, and need not be considered by me in this dissenting opinion.

Dewey Taylor had been employed by the state road commission at different times for a period of about eighteen years. He was last employed by the commission in October, 1943, and thereafter remained in its employ continuously until the time of the accident; from 1938 to 1942 and from 1943 to the date of the accident in July 1945, had acted as a crew chief or field

superintendent in charge of some six or seven men comprising a surveying crew. The men were under his supervision and direction, and he was responsible to the road commission for their activities. His immediate superior was L. C. Madden, chief engineer of the plans and survey department of the state road commission. Taylor moved his crew from place to place as directed, and as his particular work required, and likewise made arrangements for their accommodations and supervised their work in the field.

The testimony reveals that on each job convenient field headquarters would be established where board and room for the men could be obtained and that the arrangements for such accommodations were in the hands of and carried out by Taylor. The crew usually worked from eight o'clock A. M. to four o'clock P. M., except Saturdays, when they would quit at twelve o'clock noon. Taylor, in his supervisory capacity, had other duties in connection with his work, namely, the bookwork reflecting the work and progress that had been made on a job and which was summarized for the purpose of reporting the details to his superior at headquarters; this work required extra time on his part and was usually performed either at his home or at and near the place where the crew was employed. This bookwork, of course, was a necessary part of his employment, and on the day of the accident, according to the testimony, he had been engaged for several hours at Ripley, West Virginia, the place of the crew headquarters, in finishing and completing the facts and figures concerning the survey that was being made some fifteen miles from Ripley. Ever since he began to act as crew chief, back in 1938, the road commission had furnished him a motor vehicle or station wagon to use in and about the performance of his duties. He was entrusted with the complete custody, control, and management of such vehicle, and of course would be responsible for it during all of the period that it was in his charge and care. I make the positive observation that the record reveals that Taylor was never at any time given any specific instructions or directions, either oral or written, by his superior or anyone else in the road commission as to what use

he could or could not make of the vehicle. Of course, the evidence shows that the question was asked Madden, his immediate superior, as to whether he had given him any authority to use the station wagon; it was answered in the negative, but this testimony means absolutely nothing so far as the authority vested in Taylor in using the wagon in question was concerned. It was not denied that he had the right to use it at all times; that he did so use it, and that he had not only used it three or four times while working on the job near Ripley to return to his home as he was doing at the time of the accident, but that he had also used it while working on a job near Parkersburg in driving to his home over the week end. These facts, to my notion, establish beyond all question that full authority had been given to Taylor to use the station wagon at all times in the course of his employment, and especially so in going to his home over week ends; and further that his use of the wagon under the circumstances and facts as revealed lead to the conclusion that this was part of the consideration of his employment and seemingly expeditious in carrying out his work, and therefore in the end beneficial to the road department.

The accident happened, as indicated, through the gross negli- 14, 1945, the date of the accident, Taylor and several of his crew left Ripley at about two o'clock P. M. on the way to the home of the said Taylor and one John Walker, a member of the crew, both of whom lived at Walton. Taylor intended to stop at Spencer, and did stop there, where he negotiated arrangements with the manager of the hotel to accommodate his crew at that particular place and which was being moved from the operations near Ripley to new work in and about Spencer.

The accident happened, as indicated, through the gross negligence and carelessness of the said Taylor, between Spencer and the town of Walton about six-thirty or seven o'clock on the night in question, and was caused by Taylor deliberately crossing to the wrong side of the road and bringing about, while traveling at a rather high rate of speed a violent collision with the claimants, who were traveling in the opposite direction and thereby causing serious injuries to the claimants and perhaps

serious permanent injuries to at least one of them. Taylor, at the very scene of the accident, admitted his negligence and carelssness. Throughout the hearing and nowhere in the majority opinion, is any negligence of any kind imputed to the claimants or any of them.

In my opinion, considering all the circumstances, namely, that Taylor was acting in a supervisory capacity and at places and points away from the employer's main headquarters, that he was vested with the right to exercise judgment and discretion in the performance of his own duties as well as those of his crew; that no specific instructions, either oral or written, had ever been given him defining and limiting the range or scope within which he could act, made him, in fact, a subprincipal and liable in a higher degree for injuries to innocent third persons than some minor employee of the crew would have been. Taylor himself was driving the station wagon at the time of the accident.

Courts have held as shown by the case of *Ashland Coca-Cola Bottling Co. et al* v. *Ellison et al*, 252 Ky. 172; 66 S. W. (2d) 52, that, where the employee's time is not confined and calls for the general supervision of the company's business through traveling over the territory and with general authority to use the company's automobile, circumstances tending to support the charge that he was about his master's business assume an importance and call for consideration greater than would the same circumstances were the employee a minor one. So also, have courts held that the relationship of master and servant does not depend merely on the time employed at the employee's actual work, but may exist outside of actual working time. Our own West Virginia Court of Appeals has several times held that the real test or criterion of whether a servant's act is within the scope of his employment lies in the relationship which the act done bears to the employment. *Cochran* v. *Michaels* 110 W. Va. 127; and other cases.

That Taylor stopped at Spencer and made the arrangements for accommodations for his crew which was to be quartered

the following week is uncontradicted. However, the state road department insists that Taylor was drunk or intoxicated at the time of the accident and that under the circumstances as herein set forth, he was not acting within the scope of his employment It may be well to dispose of the question of intoxication before considering the other matter which I believe to be conclusive so far as the liability of the state road commission is concerned.

As is so ably set forth in claimant's brief, I hold to the opinion that whether or not Taylor was intoxicated is immaterial upon the inquiry as to whether at the time of the accident he was acting within the scope of his employment. Blashfield's Cyclopedia of Automobile Law & Practice, Vol. 5, Sec. 3036, and cases cited, lays down this rule, which in my judgment controls so far as the question of intoxication involved in this issue may be concerned, to wit:

> "According to some authority, and probably the better rule, the taking of a drink by a servant in violation of his instructions is not such a deviation, of itself, from his duty as to sever pro tempore the relationship of master and servant and to relieve the master from liability for his negligence in operating the vehicle while intoxicated.
>
> "Consequently, if the servant is acting otherwise within the scope of his employment, the master is liable for damages arising from acts of the servant, although, the servant at the time was intoxicated. This is true, although, the master did not know that the servant was intoxicated." Blashfield's Cyclopedia of Automobile Law & Practice, Vol. 5, Sec. 3036, and cases cited. *Cleveland Nehi Bottling Co.* v. *Schenk* (C.C.A. Ohio), 56 F. (2d) 941; *Dixon* v. *Haynes*, 146 Wash. 163, 262 P. 119; *Crockett* v. *U. S.* (C.C.A. W. Va.), 116 F. (2d) 646; *Taylor* v. *Joyce*, 4 Cal. App. (2d) 612, 41 P. (2d) 967; *V. L. Nicholson Const. Co.* v. *Lane*, 177 Tenn. 440, 150 S. W. (2d) 1069; *Erdman* v. *Henry S. Horkheimer & Co. etc.*, 169 Md. 204, 181 A. 221.

The matter of whether Taylor was intoxicated or not is of itself not germaine to the solution of the question involved.

If it is determined that he was acting within the scope of his authority, I repeat, the question of intoxication does not enter save, and save only, as a warning to the road commission that in the future men and employees of Taylor's habits and disposition should not at any time be entrusted with the use of state automobiles, property, or station wagons.

As heretofore shown Taylor was accompanied by an employee, John Walker, both of whom resided at Walton. In the accident Walker was injured, having received a broken arm. His employer, the state road commission, was a subscriber to the workmen's compensation fund. Walker applied for compensation benefits and his claim was allowed and paid. The employer's report of injury disclosed the day, hour, place and circumstances under which the injury was received, and was certified true and correct by Walker's chief, namely, Dewey Taylor, and transmitted to the compensation commissioner by L. C. Madden, the chief engineer of the plans and survey department from the commission's headquarters. In his letter of transmittal Madden wrote "I am transmitting Form CD-13-B covering injuries to John Walker, who is employed in the Plans and Survey Department of the State Road Commission." Madden, himself, approved and certified as correct the application for the allowance of Walker's doctor and hospital bills. Subsequently the compensation commissioner entered a formal order to the effect that Walker's injury had been received in the course of and resulted from his employment. The claim was allowed and fully paid. The state road commission was no doubt fully conversant with the facts and circumstances giving rise to Walker's injury and his claim for compensation, and even assisted him in securing the allowance thereof and at no time protested in any manner against the allowance or payment thereof on the ground that his injury was not received in the course of his employment or as the result of any misconduct, or of any disobedience of any rules or instructions.

If Walker was acting within the scope of his employment at the time of his injury, as certified to by the road commission engineer, which action, of course, would bind the road commis-

sion itself, it necessarily follows that Taylor was also acting within the scope of his employment at the time of the accident and consequently responsible for the damages that may have been incurred by his negligent act. Being the employee of the state road commission, the principal becomes responsible and I cannot countenance the idea that any department should be allowed to "blow both hot and cold" under the conditions and facts as presented here. It is not only ridiculous, it is unconscionable to assume that Walker, who was paid compensation, was within the scope of his employment, and that the contrary position must now be assumed that Taylor was not acting within the scope of his employment in order to escape liability for the damages incurred to the claimants by the accident. Both were riding in the station wagon at the time: both were on their way to their homes in the same town after their work for the day had been finished; both were servants of the road commission; both were acting within the scope of their employment when the accident happened, and both, so far as their relation to their master-employer is concerned, must be governed by the same rule of responsibility to innocent third persons. I repeat, if Walker was acting within the scope of his employment at the time of his accident, as certified to by the road commission, so, also, was Taylor and there can be no escape from this conclusion.

An award should be made to these seriously injured claimants and the Legislature should so act, in my opinion, to discharge a moral obligation devolving upon the state and the agency here involved.

(No. 525—Claim denied)

EARLE HUTCHISON, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed June 17, 1946

No duty, express or implied, rests upon the state road commission of West Virginia to maintain the highways under its jurisdiction in more than reasonably safe condition for use in the usual manner and by the ordinary methods of travel; and the state does not guarantee freedom from accident of persons traveling on such highways.

Salisbury, Hackney & Lopinsky (Emerson W. Salisbury) for claimant.

W. Bryan Spillers, Assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

Claimant Earle Hutchison seeks an award in this case of $5,000.00 by way of damages for personal injuries sustained on the 9th day of January, 1946, when he, with other persons, was driving in an automobile on U. S. route 19-21 in Fayette county, West Virginia. He contends that as he was riding as a guest in said automobile, owned by one Bruce Robertson, he was injured when the vehicle turned over an embankment by reason of striking a broken portion of the highway. He maintains that it was the duty of the road commission to keep said highway in a reasonably safe condition of repair, but that on account of its failure and neglect to do so, at the time and place of the accident, a portion of the pavement or concrete of said highway had broken, thereby causing a large hole in said highway and that when the automobile struck said hole it turned over said embankment, causing the injuries of which he complains and for which he thinks he should have an ap-

propriation of the public revenues. The road commission controverts his right to such an award.

Claimant is a musician. He was a member of a six-piece band or orchestra, conducted by Messrs. Bruce Robertson and Brady Frazier, and composed of five male and one female persons, who were engaged in a common adventure or purpose. This band or orchestra played for dances in various sections. On the night of the accident it had an engagement to play for a dance at Beckley. The party left Charleston at four-thirty or five o'clock in the afternoon, traveling in a 1938 model four-door Ford automobile. The vehicle had a small one-ton two-wheel trailer attached, for the purpose of carrying musical instruments. Claimant was seated in the rear on the right side of the automobile, which was driven by Clarence Parish, who resides at Littlepage Terrace, in the city of Charleston. The night was clear.

When the automobile reached a point on an eight per cent grade on the highway, about two-tenths of a mile south of Fayetteville, in the neighborhood of seven o'clock P. M., it hit a broken place in the concrete pavement which the evidence describes as a hole. One of the occupants of the automobile testified that this hole "started in the middle of the road on the left of the right-hand side lane and stretched all the way across." The same witness also stated that after the automobile hit this hole it continued to run on the paved portion of the highway fifteen or twenty feet and then went out on the shoulder and travelled on the shoulder approximately forty to fifty feet before the vehicle turned over. The claimant was asleep in the car at the time.

The driver of the automobile testified that as he approached the place where the accident happened, driving at a speed of from thirty to thirty-five miles an hour, he saw a black place in the highway—"because the pavement is white"—and it looked like water on the road until he got right at it and it was too late to stop, and when the car hit the hole it knocked the wheel from his hand and the car veered to the right and

went out on the shoulder and right over the embankment headfirst.

When asked what caused the car to turn over, the driver of the vehicle replied: "Well, sir, the rear tire blew out, was one cause of it. The hole—when we hit this hole, I lost control of the car; it jerked the wheel out of my hand, and my left rear tire blew off, was the——"

We have heretofore held that no duty, express or implied, rests upon the state road commission of West Virginia to maintain the highways under its jurisdiction in more than reasonably safe condition for use in the usual manner and by the ordinary methods of travel: and the state does not guarantee freedom from accident of persons travelling on such highways. *Charlton, Admx.* v. *Road Commission*, case No. 483.

The road under consideration is a well constructed primary highway. The paved portion thereof is built of concrete of the width of twenty feet. There are two lanes, each ten feet wide, with berms on either side. It is an extensively used and travelled road. There is heavy hauling over it. Heat causes the concrete to expand and from time to time rough places and depressions are thus caused. The "hole" complained of in the present instance was the result of heat expansion and heavy traffic. It extended for the greater part of the width of one lane, but could not be said to constitute a hazard to any one using the road with prudence and caution. The road commission had, however, repaired the road at the place of the "hole" several times before the accident happened. When heat caused it to "blow up" in July, 1945, five feet of the concrete pavement were cut out and filled with "black top" tar and limestone chips. It had to be repaired again in the following November. Further repairs were made in December, 1945. And it was again repaired in the first week of January, 1946, prior to the accident, at which time the depression was filled with pre-mix or amacite. We think it may be reasonably said that the road commission was duly diligent in making repairs to this particular section of the road when we understand that there are a hundred and

fifty-four miles of primary roads in Fayette county to look after and keep in order.

The evidence is conflicting in respect to the speed of the automobile at the time of the accident. Claimant's testimony would fix the speed at between thirty and thiry-five miles an hour. Two eyewitnesses to the accident fixed the speed at a higher rate. When the accident happened Albert Moran was right above it. He estimated the speed of the car at fifty or sixty miles an hour. George F. Olds who stood near Moran and slightly behind him, estimated the car speed at forty-five or fifty miles an hour. Claimant himself testified that the automobile was traveling between thirty and thirty-five miles an hour, but since he was asleep when the accident happened his testimony could not be given much weight. Physical facts sometimes speak louder than words. The automobile did not turn over at the point where it struck the depression or hole in the road. F. E. Springer, a member of the state police, made an investigation of the accident immediately after it happened. He also made measurements and submitted to his department his findings. He stated that after the automobile hit the hole in the road it traveled for a distance of one hundred and two feet from the hole to where the the righthand wheels started over the embankment, then traveled sixty feet partly over the embankment until the trailer upset, pulling tne rear end of the car around over the embankment, and causing the car to turn over on its top in a ditch from a drain under the highway.

The evidence shows that the six occupants of the automobile at the time of the accident had passed over the road "a good many times" in the preceding two months—in the months of November and December—and the last time about a week before the accident. In the case of *Margaret M. Smith* v. *State Road Commission*, 1 Ct. Claims (W. Va.) 258, we held as follows:

> "When an adult woman of good intelligence, while driving her husband's automobile on a state highway passes a hole on one side of said highway caused by a

> break or slip on the rock base of said highway, which hole she could or should have seen by the use of ordinary care, and on the same day, in the daytime thereof, while driving said automobile in the opposite direction drives it into said hole and the said automobile is precipitated over an embankment and she sustains personal injuries in consequence of said accident, she will be held to be guilty of contributory negligence barring a claim for an award for damages occasioned by said accident."

It is made clear from the evidence that all six of the occupants of the automobile were familiar with the road having traveled it on different occasions as above stated. Presumably they knew of the existence of the depression or hole in the road, and if they did not they should have known by reason of their acquaintance with the highway.

We do not think that the claimant has established a case entitling him to an award. An award is therefore, denied, and the claim dismissed.

(No. 532-S—Claimant awarded $47.75)

WILLIAM G. GANTZER, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 8, 1946

ROBERT L. BLAND, JUDGE.

It appears from the claim abstract in this case that on August 9, 1944, while claimant was driving his Chevrolet automobile across Junior Avenue Bridge, in Elm Grove, Ohio county, West Virginia, on state route No. 91, the end of a loose floor board in the bridge flew up and caught the housing of the vehicle, causing damages thereto that cost $47.75 to repair, for which claim is made against the state road commission. The head

of that agency concurred in the claim, prepared a record thereof, setting forth the facts in relation to the accident, and filed the same with the clerk of this court on April 4, 1946. An itemized statement of the costs incurred in repairing the automobile was filed with this record. Payment of the claim is recommended by the state maintenance engineer and the district engineer. It is also approved for legislative appropriation by an assistant attorney general. The claim is informally considered by this court upon the record submitted as aforesaid.

In view of the recommendations made by officials of the road commission, the concurrence in the claim by the state road commissioner and the approval for payment by the attorney general's office as aforesaid, an award is made in favor of claimant William G. Gantzer, for forty-seven dollars and seventy-five cents ($47.75).

(No. 535-S—Claimant awarded $95.19)

VALVOLINE PIPE LINES COMPANY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 9, 1946

MERRIMAN S. SMITH, JUDGE.

On February 3, 1946, state road commission employees were working on secondary road No. 7 in Pleasants county, West Virginia, building a retaining wall which necessitated blasting out the rock for a foundaton. One of the blasts threw stone over the hillside and broke the two-inch oil pipe line belonging to the claimant, causing a wastage of 20.54 barrels of oil. A claim for the 20.54 barrels of oil at $2.94, amounting to $60.39, together with labor and material for repairs to the pipe line, in the amount of $34.80, making a total of $95.19, is presented for the loss sustained.

Upon investigation and examination by the state road commission the payment is recommended by the head of the department and concurred in by the attorney general.

An award is hereby authorized in the amount of ninety-five dollars and nineteen cents ($95.19) to the Valvoline Pipe Lines Company, by order of this court.

(No. 472-S—Claimant awarded $196.75)

BLAINE D. HENRY, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 10, 1946

MERRIMAN S. SMITH, JUDGE.

The circumstances out of which this claim arose were that on the early morning of December 22, 1944, claimant Blaine D. Henry was driving his Ford north on state route No. 2 near Glendale, Marshall county, West Virginia. As he approached the state road commission's headquarters one of its trucks, driven by William Kramer, was pulling another truck with a twenty-foot chain onto the highway—it being a cold morning the truck would not start on its own power. The claimant did not see the chain across the highway until he was too close to stop so he collided with the chain which threw him into the truck which was being towed, inflicting heavy damage to the front end of his Ford. There was no flag or light on the tow chain, neither were the lights burning on the truck being towed.

After due investigation by the state road commission's claim agent and upon recommendation by the head of the state road commission, which recommendation is concurred in by the attorney general, the claim is considered just and due.

Consequently, this court authorizes an award to claimant, Blaine D. Henry, in the sum of one hundred ninety-six dollars and seventy-five cents ($196.75).

(No. 499—Claim denied)

W. B. JORDAN and LENA JORDAN; BETTY LOU JORDAN and W. B. JORDAN, JR., infants under the age of twenty-one years, by W. B. JORDAN, their father, guardian and next friend, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed May 7, 1946

Rehearing denied July 15, 1946

When the state road commission, in the exercise and discharge of a governmental function, finds it necessary to repair a bridge spanning a stream of water on a state highway, removes the floor from such bridge in the performance of such repair work, and in order to warn persons traveling upon and using said highway of existing danger at the point where the bridge is located, erects a barricade, installs lights on either side of the bridge and provides a well defined detour sign with reflector lights therein, an award will not be made to claimants who attempted to drive an automobile in the night time over the said bridge from which such floor had been removed and thereby suffered personal injuries and sustained property loss.

W. A. Thornhill Jr. and *Watts, Poffenbarger, & Bowles* (L. F. Poffenbarger), for claimants;

W. Bryan Spillers, Assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

About three o'clock on the morning of September 2, 1945, claimants left their home at Kopperston, Wyoming county, West Virginia, in a 1939 model Buick automobile (owned and driven by claimant W. B. Jordan) to visit relatives in the state of Pennsylvania. They travelled in West Virginia over what is commonly called the Bolt-Glen Daniel highway, being a public highway leading from Glen Rogers, in Wyoming

county, to Glen Daniel, in Raleigh county. They contend that about four-fifteen o'clock, not yet daylight, near what is known as the Crouch farm, between said Glen Rogers and Glen Daniel, the state road commission had been repairing a bridge over which said state highway passes, and that said bridge had been removed and there was no barricade, lights or warning signs of any kind to warn the public generally that the said bridge was not in order, and that their said automobile plunged from the said highway into the stream of water supposedly spanned by said bridge, as the result of which each of said claimants was seriously injured, requiring hospitalization and medical treatment for a long period of time; and that as further result of said accident the automobile owned and operated by the said W. B. Jordan was completely demolished and thereby became a total loss.

Claimants further contend that their injuries were caused by gross negligence upon the part of employees of the state road commission, and not contributed to in any way by themselves. They seek such damages and compensation for their injuries and loss as may be fair and proper.

The state, by its plea filed in the case, denies all responsibility in the premises.

A veritable mass of testimony was introduced upon the hearing of the claims. This evidence has been carefully considered. The claims may well and easily be determined upon the solution of a single issue of fact, namely, did the state road commission take proper steps and employ necessary measures to warn all users of the highway of danger at the location of the bridge? Majority members of the court find that it did. A sufficient barricade was erected, lights on either side of the bridge were installed, and a well defined detour sign, plainly marked, with reflector lights thereon, was provided.

Claimant, W. B. Jordan, who was operating the automobile at the time of the accident, tesified that the highway was straight and level for over a half mile before he reached the

bridge. He should, therefore, have had good view of the reflector lights from the detour sign.

In repairing the bridge the road commission was engaged in the performance of a governmental duty, and where a governmental duty rests upon a state or any of its instrumentalities, there is absolute immunity in respect to all acts or agencies. Am. Jur. Vol. 49, Sec. 73, p. 284.

It does not follow that because an accident occurs on a public highway that the state should make compensation for personal injuries suffered or property loss sustained. It may be observed at this juncture that W. B. Jordan collected from an Insurance Company the sum of $588.00 on account of damage done to his automobile in his unfortunate accident.

There was no "trap" at the bridge location. The evidence of several witnesses introduced and vouched for by claimants shows conclusively that the road commission had safe-guarded the bridge in proper manner. The evidence offered by the state left no doubt in that respect.

Awards to the several claimants and each of them are denied and their claims dismissed by majority members of the court. Judge Schuck will file a dissenting opinion.

CHARLES J. SCHUCK, JUDGE, dissenting.

While there are marked and distinct contradictions in the testimony submitted in this case, yet, in my judgment, the evidence submitted on the part of the claimant preponderates in his favor, and creates a presumption that those in charge of the rebuilding of the bridge in question did not use the necessary care to avoid an accident to a traveler on the highway at the time that the old bridge had been removed and that the highway was left open without proper precautions to the traveling public.

A number of witnesses testified both for the claimant and the respondent and, giving weight to the nature of the tesiti-

mony offered, I am driven to the conclusion as indicated, that the witnesses who testified for the claimant, especially those whose depositions were taken at Beckley, were strong in their statements that the proper precautions had not been taken by the road crew in charge of the reconstruction of the bridge. Several of these witnesses passed the point of the accident as late as nine o'clock on Saturday night, the night before the accident, and seemingly were so confused by the situation that was presented, that they stopped their cars, got out to make an examination of the road before proceeding, and found that no warning lights were burning at that time. This was a highly dangerous situation that confronted the traveling public, and extraordinary precautions ought to have been taken to avoid accidents that might result either in death or serious injuries to a traveler.

An examination of the testimony given by the witness, Eller, who was the bridge foreman in charge of the reconstruction of the bridge at the time, shows without contradiction that the crew working on the reconstruction left the bridge at six-thirty o'clock on Friday evening previous to the accident and that he was the last one there and left at the time indicated; that no member of the crew, including himself, visited the scene of this work at any time on Saturday, and that his first appearance was made at the place in question at nine o'clock on Sunday morning, some time after the accident to the claimants had occurred. Assuming that the proper barricades were constructed at the time, although there is some question in this respect, the fact remains as shown by his testimony that only two lights or flares, one on each side of the opening caused by the removal of the bridge. were placed and that it was intended that these lights or flares should be notice to the traveling public during all day Saturday, Saturday night, Sunday, and Sunday night, before the crew would return to continue the work of the reconstruction of the bridge on Monday morning. This fact, in my opinion, does not show the necessary precautionary measures to safeguard the interest of the traveling public on the highway being repaired. The highway involved is

one of the main arteries in that section of the state; traffic is heavy on it; it was and is much traveled; yet in view of these facts there was to be no inspection on Saturday evening by the road crew, or any member of it, to ascertain whether or not the flares were still burning and whether or not the barricades were still in place, as they had been left the day before. The road crew did not work on Saturday.

The witness Eller says that a new supervisor was to take charge on Monday morning and that it was his, Eller's duty, (record page 88) to simply place the flares on Friday evening and pay no further attention to them. The new supervisor so far as the record reveals neither made an inspection nor had anyone else do it on Saturday or Saturday night to ascertain whether or not the lights and the flares in question were still in place and properly burning as warnings to travelers; this, of itself, was negligence, in my judgment. I am of the opinion also, that flares cannot be expected to remain lit for 40 to 48 hours, at least it would seem reasonable not to take chances in this regard, and that an examination should be made at least within 24 hours where a highly traveled road is left open as this highway was, and where the likelihood of a serious accident is so imminent. I repeat that, in my judgment, the testimony preponderates in favor of the claimant that the proper precautions were not taken to warn the traveling public of the condition that existed at the place of the accident, and to indicate that the bridge had been removed; that the necessary steps to see that these barricades and flares were still in their proper places on Saturday had not been taken, and that at the time of the accident, through no fault of claimants, there were no warning signals sufficient to inform him of the dangerous situation that was ahead of him on the highway in question. Under these conditions, I would favor an award.

Upon petition for rehearing.

Rehearing denied by majority of the court on July 15, 1946, Judge Schuck dissenting.

(No. 530—Claim dismissed)

MARGARET GILPIN MORROW, et als, Claimants,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 17, 1946

Where the facts presented in a claim filed show clearly that this court is without jurisdiction, a motion to dismiss will be sustained.

Appearances:

Claimant, *Margaret Gilpin Morrow*, for claimants;

Eston B. Stephenson, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimants, the owners in fee of a certain tract of land comprising about 51.08 acres situated in Cabell county, West Virginia, ask for damages in the amount of $5000.00 for the wrongful appropriation by the state road commission of a portion of said tract now used as a public road and known and designated on the state road maps as "secondary road No. 46." Claimants allege that the said appropriation of the land in question took place in the summer or autumn of 1934 and that work on the road was started and carried on by the commission in the fall of 1945. Claimants, one of whom has died since the filing of this claim, were non-residents of the state and seldom visited or saw the said tract. They allege further that they have never received any notice of the alleged appropriation by the state and did not know of the road commission's action until a long time after the entry and taking of the said portion of land. No action to compel the road commission to institute condemnation proceedings has ever been taken by the claimants or either of them. In fact, no suit or action of any

kind, except the presentation of the claim here, has ever been instituted by the claimants, or either of them, to seek or obtain redress for the alleged trespass.

Under the foregoing allegations and facts the respondent filed a motion to dismiss in the nature of a plea for want of jurisdiction on the part of this court to hear and determine the issues involved, and argued that the act of the Legislature creating the Court of Claims specifically denied it jurisdiction to hear any claim in respect to which proceedings in the state courts may be maintained.

It is obvious that the record before us and the facts as revealed clearly show that whatever rights claimants have or may have had should or ought to have been asserted in the state courts and that no claim is here presented, the determination of which is within the jurisdiction of this court to hear and decide. Clearly, under the laws of our state, any question of damages incident to or occasioned by the alleged appropriation of the land by the road commission would first have to be determined in a proper proceeding in a state court.

The motion to dismiss the claim is therefore sustained.

(No. 531—Claimant awarded $462.00)

BERKELEY PRINTING & PUBLISHING COMPANY, a corporation, Claimant,

v.

STATE AUDITOR, Respondent.

Opinion filed July 17, 1946

When a publishing company publishes legal notices contracted for by constitutional authority, as prescribed by statute, it becomes a just obligation and an award should be made

Harry H. Byrer, Jr., for claimant:

W. Bryan Spillers, Assistant Attorney General, for respondent

MERRIMAN S. SMITH, JUDGE

The Berkeley Printing & Publishing Company, a corporation doing business in Martinsburg, Berkeley county, West Virginia, was requested to publish notices to redeem from sale to the public land corporation, during the months of January, February and March of 1943, by William D. Morton, clerk of the circuit court of Berkeley county West Virginia, and Charles A. Cain, deputy commissioner for forfeited and delinquent lands for the county of Berkeley, West Virginia. The said publishing company advertised these redemption notices as prescribed by the 1941 Acts of the Legislature, chap. 117, art. 4, sec. 36, 37, 38 and rendered two statements, the one for 8 certification numbers in the amount of $144.00 the other for 8 certification numbers in the amount of $318.00, making a total of $462.00.

On March 26, 1943, the Supreme Court of Appeals of West Virginia, in the case of *State Auditor et als v. Fisher, Judge*, 125 W. Va. 512, 25 S. E. (2d) 216, declared a part of the 1941 Act of the Legislature insofar as it requires performance

of administrative duties by circuit courts in connection with sale of lands for the benefit of school funds to be unconstitutional. As a result of this decision the payment of the obligation of $462.00 to the claimant has not been made and is still due and unpaid.

When a publishing company, acting in good faith, publishes legal notices contracted for by constitutional authority, as prescribed by statute, it becomes a just obligation and the fact that a part of the statute is declared unconstitutional at a later date is not sufficient reason for nonpayment of an honest debt. The integrity and credit of the state of West Virginia should be beyond question at all times and common right and justice demand that its creditors should have no fear that such obligations will not be honored so long as it is a sovereign state.

The failure to pay the state's just obligations because of a technicality arising from the subsequent declaration of the law under which the obligation was created as unconstitutional would be a blot upon the escutcheon of the public policy and character of the state and a condition might arise whereby its prospective creditors would demand cash payment before the performance of the contract for fear that the statute under which it was authorized might be declared unconstitutional and payment be denied only by virtue of such technicality.

This court recommends an award in the amount of four hundred and sixty-two dollars ($462.00) to claimant, the Berkeley Printing and Publishing Company, a corporation, of Martinsburg, West Virginia.

(No. 540—Claim dismissed)

E. Y. McVEY, Claimant,

v.

STATE DEPARTMENT OF MINES, Respondent.

Opinion filed July 18, 1946

Where the petition filed and the testimony adduced clearly show that the claimant has the right to have his claim heard and determined in a state court, this court is without jurisdiction, and a motion to dismiss for want of jurisdiction will be sustained.

Appearances:

Claimant, in his own behalf;

Eston B. Stephenson, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

Claimant, E. Y. McVey, heretofore filed his petition asking for an award of $1650.00, representing five months salary as a state mine inspector at a salary of $325.00 per month, from August 1, 1945 to December 31, 1945. Claimant had for some years previous to August 1, 1945, been employed as a mine inspector by the state department of mines; was serving a four-year term, expiring December 31, 1945, when he was dismissed without cause from the service effective July 31, 1945, as he maintains in his petition, and has never been paid for the five months period remaining in the said term of employment. To his petition and application for an award by this court the department involved filed a general denial of liability and a special plea asking the court to dismiss the case or claim on the ground that claimant had an adequate remedy in the circuit courts of this state, and that, therefore, this court was without jurisdiction to hear and determine the matters here presented.

The act of the Legislature creating the State Court of Claims specifically provides, subsection 7, section 14 of chapter 20 of

the Acts of 1941, that the jurisdiction of this court does not extend to any claim upon which a proceeding may be maintained by a claimant in the courts of the state.

In a case based on facts almost identical with those revealed by the hearing before us, our Supreme Court of Appeals took jurisdiction of an original proceeding in mandamus *inter alia* the issuing of a requisition for his full salary during the period of petitioner's ouster. See *LePage* v. *Bailey*, 114 W. Va. 25. LePage had, likewise, been a district mine inspector regularly appointed for the term of four years, ending December 31, 1933, and by action of the chief of the department of mines was summarily dismissed from the service as of March 20, 1933, leaving approximately nine months remaining during his regular term of service for which he had been appointed. He was not paid for the unexpired part of the term and in his petition for the writ of mandamus asked payment accordingly. The writ was awarded and this action on the part of the Supreme Court clearly shows that the claimant here has an adequate remedy in the courts of our state and that therefore the Court of Claims is without jurisdiction to hear and determine the issues presented by claimant's petition and testimony.

We, therefore, sustain respondent's motion to dismiss the claim.

(No. 534—Claimant awarded $3 341.52)

LEROY ROBERTS, Claimant.

v.

STATE BOARD OF CONTROL, Respondent.

Opinion filed July 19, 1946

Pursuant to the purpose and spirit of the Act of the Legislature creating the State Court of Claims, an award may be made for the payment of a claim against the state when the peculiar facts supporting such claim show it to be just and meritorious and for which the state has received distinct value and benefit.

Blessing & Musgrave (R. A. Blessing) for claimant;

Eston B. Stephenson, Assistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE

The claim in this case is for materials furnished and labor performed in repairing a water tank at Concord College, a state institution, located at Athens, in Mercer county, West Virginia. The West Virginia board of control, a state agency, has control of the finances and business affairs of said Concord College and is vested by statute with title to all of its property.

A large tank, installed about the year 1922 upon a tower one hundred and fifty feet in height from the ground at an elevated location, supplies water and furnishes fire protection not only to the various college buildings but also to the inhabitants of the town of Athens. The water for this tank is obtained from wells drilled on the college premises. The bottom of the tank had deteriorated over a long period of use and was leaking. It was possible that electrical apparatus employed to precipitate the water into the tank also contributed to the condition of the bottom of the tank, or its deterioration could have

been caused by electrolysis. Temporary repairs had been made but no substantial results accomplished.

Claimant LeRoy Roberts, a contractor of Huntington, West Virginia, skilled in the line of his work, had successfully and very satisfactorily repaired a tank at Lakin, an institution for the treatment and care of the colored insane persons of the state and also done other good work at the instance of the board of control. With such knowledge, W. C. Cook, treasurer of the board of control, communicated in writing with J. F. Marsh, then president of the college and now president emeritus, having been succeeded as head of the institution by Virgil H. Stewart, suggesting claimant as one who might be interested in examining the tank in question for possible repairs during the college vacaton in August. President Marsh did take up the matter with claimant on the 27th of June, 1944. Claimant thereafter made a personal inspection of the condition of the water tank and recommended the requirement of a new bottom in order to give satisfaction. The bottom of the tank was leaking and practically worthless. Claimant was then directed by President Marsh to go ahead and order a new bottom for the tank, since an emergency existed. This was deemed expedient since they "would have no fire protection whatever for the building or the city." Claimant immediately contacted the former fabricator of the tank and obtained a quotation as to the cost of a new bottom for the old tank. This quotation was $525.00 f. o. b. Neville Island, Pittsburgh, Pennsylvania. The new bottom was ordered by claimant and ready for shipment but the plant went on strike and the new tank bottom could not, for that reason, be gotten away from the factory. When the bottom finally reached the college in November, claimant removed the old section of the tank and put in the new bottom, but by this time it was the latter part of November and the weather was beginning to get cold. It was necessary to carry an emergency line on the tank in order to protect the buildings and to give the town of Athens, seat of the college, an immediate water supply. Also by this time there was a blizzard and the overflow line froze. Ice about four feet thick accumulated around

the stand pipe and over all of the equipment and a considerable section of the buildings. This blizzard lasted about four days during which time claimant and his force of workmen could not get back on the tank. Similar conditions of the weather continued from time to time, lasting two to three and one-half days and which necessarily retarded the progress of the work and added materially to its cost.

While the emergency line was frozen, the superintendent of buildings and grounds cut the water back into the tank thus causing considerable trouble and subjecting claimant to a further and greater outlay and expenditure of money.

The evidence discloses that claimant in order to place the new bottom in the tank actually paid the total sum of $3507.02. Of this amount he paid for the new bottom and other materials necessarily used on the job $1141.89. He had a force of about six men from time to time and paid his labor $2365.13. He also purchased and used materials for which he made no charge against the state. During the time the work was in progress workmen employed on the job were furnished meals at the college at a total of $165.50 for which amount he gives due credit. The evidence further reveals that claimant made no profits whatever on the transaction, but actually lost money.

The claimant had no formal contract in writing with the board of control, but it clearly appears that the work was authorized by at least one member of the board and by the president of the college. Claimant was assured that his proposal would be held and treated as a contract for the work and that the president of the college was arranging for the execution of a contract. The work was irregularly done insofar as a contract was concerned, but it was well done and entirely satisfactory to the president of the college and to the board of control. Two members of the board testified before this court to that effect and expressed the opinion that the work should be paid for. The state has received distinct value and benefit from the work. The claimant has acted in good faith and has never received any compensation for his labor or outlay of money. We believe that the claim is possessed of peculiar worth and

merit, and is an obligation which the state should discharge. We are impressed by the thought that the claim is in fact a distinct moral obligation of the state.

An award is, therefore, made in favor of claimant, LeRoy Roberts, for thirty-three hundred forty-one dollars and fifty-two cents ($3341.52).

(No. 539—Claim denied)

NELVINA LOGAN, admx. of the estate of JOHN H. LOGAN, deceased, Claimant,

v.

STATE ROAD COMMISSION, Respondent.

Opinion filed July 23, 1946

When an employee of the state contracts lobar pneumonia and dies therefrom and the testimony fails to connect the incipiency of the disease directly with any act of his employment there will be a denial of an award.

Appearances:

Emerson W. Salisbury and *H. R. Hark*, for claimant;

Eston B. Stephenson, Assistant Attorney General, for respondent.

MERRIMAN S. SMITH, JUDGE.

John H. Logan, employed as a laborer with the state road commission at Mount Carbon, Fayette county, West Virginia, contracted lobar pneumonia and died on December 14, 1944. His daughter, Nelvina Logan, the duly appointed administratrix of his estate, instituted this claim for damages against the state road commission alleging negligence on the part of the state in not furnishing proper transportation for its employees to and from work. The testimony was to the effect that the

state provided an open dump truck in transporting four or five of its employees, among them the deceased, from Mount Carbon to various projects ranging from eight to twelve miles; and at this season of the year the work was principally cindering or patching the highway and that under these conditions it was not practical to use a tarpaulin for the men while thus engaged.

It was further adduced from the evidence that Logan had suffered from an asthmatic condition for a number of years, and during the week prior to his critical illness he had contracted a cold, but notwithstanding this condition, he worked every day up to and including Saturday, and on Sunday he became critically ill and when a physician was called on Monday he diagnosed the illness as lobar pneumonia from which he (Logan) died on Thursday.

The testimony further brought out the fact that on Saturday night Logan walked about a mile to the store and back to his home; and from the very nature of the disease of lobar pneumonia it is quite possible that such exposure on a wintry night could have easily caused the disease in question to be contracted by a person of his age and especially so in his already susceptible condition. There was not a scintilla of evidence that connected his development of pneumonia with any act of omission or commission on the part of the state, and it would be a travesty of justice to impose damages for a death from natural causes, as adduced from the death certificate filed as evidence in this claim, and especially since the very nature of the work assumed by the decedent during the previous three years was largely in keeping the snow and ice off the highways during the inclement wintry blasts, so prevalent each year throughout this mountainous section, and to which the deceased was accustomed.

This court refuses to recommend an award to the claimant herein.

(No. 549-S—Claimant awarded $24.48)

CHARLES A. STUKEY, Claimant,

v

STATE ROAD COMMISSION, Respondent.

Opinion filed October 19, 1946

MERRIMAN S. SMITH, Judge.

On the morning of January 5, 1946, while blasting the concrete floor of a bridge over Worthington Creek on state road No. 47, in Wood county, West Virginia, the concussion followed a ravine for a distance of about 1200 feet, damaging the sash and window size 55" x 67", in the home of claimant, the cost of repairs amounting to $24.48.

This claim was concurred in by the state road commission and approved by the attorney general under the shortened procedure provision of the Court of Claims Act, and after due consideration by the Court of Claims an award in the amount of twenty-four dollars and forty-eight cents ($24.48) is hereby granted to the claimant.

(No. 550-S—Claimant awarded $25.00)

L. E. VAN CAMP, Claimant,

v

STATE ROAD COMMISSION, Respondent.

Opinion filed October 19, 1946

MERRIMAN S. SMITH, JUDGE.

The employees of the state road commission were blasting in soapstone rock on the Wolf Pen Road, secondary road No. 32,

in Tyler county, West Virginia, on September 7, 1945. In so doing rocks were thrown for a distance of about 200 feet, damaging the metal roofs of the house and barn and breaking ten 8" x 10" window glass in the home belonging to claimant to the extent of $25.00.

The state road commission, the state agency concerned, concurs in this claim and the attorney general approves the claim and recommends payment.

An award is hereby granted to claimant, L. E. Van Camp, in the sum of twenty-five dollars ($25.00).

(No. 551-S—Claimant awarded $85.87)

HERMAN BUCHANAN, Claimant,

v

STATE ROAD COMMISSION, Respondent.

Opinion filed October 19, 1946

CHARLES J. SCHUCK, Judge.

On March 16, 1946, certain employees of the state road commission were engaged in painting or marking certain lines in and upon route No. 2 in Brooke county, West Virginia, and used in connection with this work a certain steel marker, the purpose of which was to keep passing cars and trucks off the newly painted lines and away from the wet paint.

The record discloses that on the day in question, after the employees had finished their work they left the steel marker lying on the highway having failed to remove it, and while claimant's truck, loaded with coal, was passing over and along said highway in a southerly direction, the truck ran over the steel marker in question cutting a hole in the new tire on claimant's truck, so large that the tire was beyond repair and had to be discarded or "junked." It seems that the steel marker

was lying on the right side of the road in the path of claimant's oncoming truck causing the injury to the dual tire on the right rear wheel. The value of the tire at the time of the accident is fixed at $85.87. The officials of the state road commission recommend payment and this recommendation is approved by the attorney general. An award is therefore made in favor of the claimant in the sum of eighty-five dollars and eighty-seven cents ($85.87).

(No. 553-S—Claimant awarded $150.00)

J. F. BOND, Claimant,

v

STATE ROAD COMMISSION, Respondent.

Opinion filed October 19, 1946

ROBERT L. BLAND, Judge.

The claim in this case, for which an award is made, is predicated upon the damage resulting from a dynamite explosion which occurred on secondary road No. 18/1, in Nicholas county, West Virginia, under the jurisdiction of the state road commission, on June 18, 1946. On that day, according to the record of the claim, prepared by the head of the state agency against which it is asserted and filed in the Court of Claims on September 18, 1946, in Nicholas county, West Virginia, Edward Spencer and his son, Lindbergh Spencer, employees of the state road commission, put off a shot of dynamiate, drilled type, two hundred and forty feet from where claimant J. F. Bond was working his horse ploughing corn. The horse, becoming frightened by the blast, ran away with the cultivator plow attached. The animal's right rear leg below the hock joint was so badly lacerated that it was necessary to destroy it. The evidence shows that the horse was valuable and that its reasonable worth was $150.00. Claimant only asks that amount by way of damages, although it appears

that his plow and harness were broken and damaged. As a result of the accident it appears from the record that claimant was obliged to expend approximately $90.00 to do the work in which he was engaged when the blasting occurred. No warning of the intended blasting was given at claimant's dwelling house approximately five hundred feet from the point where the blasting was done. Proper precautionary measures against danger were not employed by the employees of the road commission. The claim is concurred in by the state road commission and approved by an assistant attorney general. The state maintenance engineer, the district engineer and the state claim agent recommended compensation to the claimant.

In our opinion the claim in question is meritorious and one for which an appropriation of the public revenue should be made by the Legislature; and an award is, therefore, made in favor of claimant J. F. Bond for the sum of one hundred and fifty dollars, ($150.00).

(No. 555-S—Claimant awarded $72.75)

ROSE LEMASTERS, Claimant,

v

STATE ROAD COMMISSION, Respondent.

Opinion filed October 19, 1946

CHARLES J. SCHUCK, Judge.

Claimant, a seamstress, while walking or crossing a bridge over Middle Island Creek in Tyler county, at about ten o'clock P. M., on August 17, 1946, was obliged to step to the west side of the bridge to avoid an oncoming automobile; this action on her part being further necessary by reason of the construction of the bridge and to save herself from being struck by the automobile. In so doing she stepped into a hole in the bridge and sustained injuries to her knee and thigh. The bridge forms

part of secondary road No. 7, and is known as the Middlebourne-Wick Road. Her injuries were of such nature as to require the services of a physician who made six visits to her home to treat and dress her wounds, and who charged $22.75 for his services. The physician, as shown by the record, treated her for about three weeks before she was discharged from his care and attention. In addition to the physician's charge she claims an additional fifty dollars for her loss of services. No itemized account is before us as the value of said services. However, when we consider that she required a physician's attention for a period of three weeks and the pain and suffering incident to her injuries, we feel that the amount claimed is just and reasonable. The department involved recommends payment of the claim and the attorney general concurs in the recommendation. Accordingly an award is made in the sum of seventy-two dollars and seventy-five cents ($72.75) in favor of the claimant. Rose LeMasters.

ROBERT L. BLAND, Judge, dissenting.

In my opinion the facts set forth in the record of this case, prepared by the state road commission and filed in this Court under the provisions of sec. 17 of chapter 14 of the code, are insufficient to justify or authorize an award in favor of the claimant. The only facts actually established are that the claimant met with an accident on a state-controlled highway and incurred liability to pay a physician the sum of $22.75 for medical services rendered. Such medical treatment was received according to the record, showing, from August 18, 1946, to September 9, 1946. It is true, however, that claimant deposes that she is a seamstress and added: "I estimate that loss of time from my sewing due to the injury will be $50.00." This is purely speculative. There is no proof that she had any sewing opportunities or engagements.

Claimant and the companion were returning home about ten o'clock at night from a friend's house and found it necessary to cross the bridge spanning Middle Island Creek on the Midlebourne-Wick secondary road in Tyler county, West Virginia, and were walking on the left side of the bridge about

half way across the bridge when they were crowded to the west side by an automobile. The claimant stepped into a hole in the floor of the bridge. How long had the hole been there? Was it there when claimant with her companion crossed the bridge to visit a friend? Did they cross the bridge in the daytime? The court is not advised as to these facts. Why not? If claimant crossed the bridge in the daytime and the hole was in the bridge at that time she could have seen it or should have seen it.

In respect to claim No. 118, *Marguerite M. Smith* v. *State Road Commission*, 1 Ct. Claims (W. Va.) 258, we held as follows:

> "1. When an adult woman of good intelligence, while driving her husband's automobile on a state highway passes a hole on one side of said highway caused by a break or slip on the rock base of said highway, which hole she could or should have seen by the use of ordinary care, and on the same day, in the daytime thereof, while driving said automobile in the opposite direction drives into said hole and the said automobile is precipitated over an embankment and she sustains personal injuries in consequence of said accident. she will be held to be guilty of contributory negligence barring a claim for an award for damages occasioned by said accident."

This court is in no position to make an award of the public revenues of the state unless it is made to appear affirmatively to the court that the facts supporting such claim establish the meritorious character hereof. The court cannot arbitrarily make an award. It is the duty of the Legislature to safeguard the public funds. This court should not be held to be a mere ratifying instrumentality. An award should not be made, even though the claim in question is concurred in by the head of the state agency involved and approved by the attorney general's office, in the absence of facts found in the record upon which an award could be properly based.

Because I find that the award made in this case is purely arbitrary and not supported by facts waranting it, I respectfully dissent from the action of my colleagues.

(No. 552—Claimant awarded $300.00)

ALFRED F. DEMILIA, Claimant,

v

DEPARTMENT OF PROBATION AND PAROLE, Respondent.

Opinion filed November 7, 1946

To release a prisoner from the penitentiary upon parole without having a bond executed as required by chap. 62, art 12, sec. 17, of the code of West Virginia, is improper and in violation of said provision and makes the state liable for any injury that said parolee, as such may cause to any person during the period of his parole.

Appearances:

Hendricks, Jones & Bouldin (*D. B. Jones*), for the claimant;

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, Judge.

On December 6, 1945, and in the nighttime of the said day, claimant, a practicing physician in the town of Whitesville, Boone County, had his 1939 Packard automobile stolen by one Edward Linville, a parolee from the West Virginia penitentiary. While being driven along highway route No. 3, in said county, by the said parolee, the car was wrecked and damaged and the claimant now asks for an award by this court in the sum of $950.00 to cover the repair bill, loss of use of the automobile, and depreciation.

Claimant maintains that the said parolee was released from the state penitentiary without executing a bond as required by chap. 62, art. 12, sec. 17, of the code of West Virginia, which provides, *inter alia*, that one so parolled:

> " . . . shall enter into a bond in such sum as the director may require, with or without sureties, to

> perform the conditions of his parole, which bond shall be payable to the state of West Virginia and shall be for the protection of all persons injured by any breach of the conditions of the parole."

The evidence reveals that the authorities at the penitentiary had drafted the form of the bond to be required, in the sum of $300.00, but that the same had never been executed, at least by the sureties named therein. The evidence as to whether the bond was executed by the parolee himself is not satisfactory and one of the intended sureties testifies positively that when the bond was received by him no signature of any kind had yet been appended to it. The reason that the intended sureties failed to sign the bond or to execute it, was because of the fact that at the time that it reached them in their home county, the said parolee had already been released from the state penitentiary and consequently the sureties refused to sign the bond. Of course, it is obvious that Linville ought not to have been released until a good and sufficient bond was fully executed. It is, therefore, manifest that his release without the bond was improper and that having committed the crime of stealing claimant's automobile, for which he was later convicted, the state must be called upon to answer for the default of its agency, and to make such amends and pay such damages to claimant as would have been paid him had the bond been properly executed.

The bond, as submitted to the intended sureties, was in the amount of $300.00. The testimony shows that this is the usual amount required in cases of release of convicts on parole from the state penitentiary. If the bond had been executed as intended claimant would be entitled in our opinion to the sum of $300.00.

Taking all of the matters into consideration, including the age of the automobile, its value immediately before and after being wrecked, and the fact that claimant received $1000.00, from the sale thereof, we are of the opinion that the sum of three hundred dollars ($300.00) would be sufficient to cover claimant's loss and make an award accordingly.

(No. 548—Claimant awarded $252.06)

APPALACHIAN ELECTRIC POWER COMPANY,
Claimant,

v

STATE ROAD COMMISSION, Respondent.

Opinion filed November 7, 1946

Claimant is entitled to an award for the burning and destruction of its transformers where a fire is negligently started under tar barrels in close proximity to claimant's poles and transformers which fire caused the said tar to overflow and explode and destroy the property of the claimant.

Appearances:

Charles Tutwiler, for the claimant;

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, Judge.

On March 14, 1945, and for some time prior thereto, the claimant, Appalachian Electric Power Company, had been engaged in the business of furnishing electric power to the community and city of Welch, as well also as to the Welch Emergency Hospital, a state-owned institution. The poles, electric lines, and transformers of claimant were located over and upon a right-of-way controlled by the state road commission and for the construction of his equipment the claimant had theretofore obtained the permission of the said commission in order that electricity might be supplied to the said state emergency hospital.

On the day in question a crew of the state road commission was engaged in making repairs on what is known as Stewart street in the said city of Welch and during the said operation was obliged to heat tar, contained in barrels, for the purpose of

spreading the said material on the street in question. An employee of the said street crew, not heeding the instructions given him by his superior to keep the barrels of tar in question far enough away from the poles and equipment of claimant, started a fire under the said barrels when they were located about fifteen feet from the said transformers; the fire under the barrels became so intense, as to cause the tar to overflow and explode, setting fire to the poles and transformers in question then belonging to claimant. The employee in question frankly admits his failure to follow the instructions of the foreman and says that had the tar been heated at a place of safety the destruction of the property in question would not have occurred, (record p. 20). The foreman also testifies that he had given the said instructions, but that they were not heeded.

Under the circumstances, it is obvious that the employee in starting the fire at the place near claimant's equipment was guilty of such negligence as to warrant an award, since it is conceded that the claimant had a full right to the use of its poles, wires, transformers, and equipment at the place and points where they had been constructed and used for the purpose of furnishing electricity and light to the hospital in question. The claim is in the amount of $252.06, as shown by the evidence and has heretofore been recommended for payment by the state road commission and approved for payment by the office of the attorney general.

We are of the opinion that the claimant is entitled to an award in the amount of two hundred and fifty-two dollars and six cents ($252.06), and so hold.

(No. 545—Claimant awarded $400.00)

JIMMIE MARKS, *an infant* who prosecutes his claim by CHARLEY MARKS, his next friend, Claimant,

v

STATE ROAD COMMISSION, Respondent.

Opinion filed November 7, 1946

A case in which, upon the facts proved, an award is made in favor of an infant male child who suffered a broken arm while crossing over a defective bridge on a state-controlled highway.

Charles A. Duffield, Jr., and *John H. Fox*, for claimant.

W. Bryan Spillers, Assistant Attorney General, for respondent.

ROBERT L. BLAND, Judge.

On the 21st day of June, 1946, claimant, Jimmie Marks, fifteen years of age, who prosecutes his claim against the state road commission by Charley Marks, his father and next friend, left his father's home in Braxton county, West Virginia, on horseback, for the purpose of going to the farm of Victor Bender, some miles distant, to assist the latter in putting up hay. The horse he was riding weighed between eight hundred and nine hundred pounds. When he attempted to cross the small wooden bridge on Little Otter Creek, on a secondary road under the supervision and control of the state road commission, one leg of the horse fell through a defective and rotten portion of the bridge. As a result of this accident the boy was thrown from the horse into the creek. By reason of the fall the boy's left arm was badly broken below the elbow. He was removed to a hospital at Gassaway for care and treatment. A citizen of Braxton county examined the bridge on the evening of the day of the accident, and found that the particular plank in the bridge through which the horse's foot fell was rotted to the extent that he broke off pieces of it with his hand.

One of the bones in the boy's arm protruded through the flesh, and he was obliged to wear a cast for more than two months, and endured exceeding pain and suffering. Although there has been improvement in the arm it will remain permanently crooked and deformed.

Giving due consideration to all of the evidence heard upon the investigation of the claim, we are of opinion that an award should be made.

An award is, therefore, made in favor of the claimant for the sum of four hundred dollars ($400.00).

(No. 48—Motion denied)

J. C. RICHARDS, Claimant,

v

STATE BOARD OF EDUCATION, and BOARD OF EDUCATION OF CALHOUN COUNTY, Respondents.

Opinion filed November 8, 1946

The Court of Claims is without jurisdiction to hear and determine or to make an award in any matter or claim involving a county boar of education. Reaffirming *Dillon* v. *Board of Education*, 1 Ct. Claims (W. Va.) 366.

Appearances:

R. E. Bills and *I. M. Underwood* for the claimant;

W. Bryan Spillers, Assistant Attorney General. for the state.

CHARLES J. SCHUCK, Judge.

This proceeding is in the nature of a motion to vacate an order heretofore entered by this court, reversing an award of $5,000.00 to claimant and denying the award on the ground that the Court of Claims was without jurisdiction to hear and

determine any matter involving a claim against a county board of education.

This claim was first presented to this court at the April term 1942, and involved serious and permanent injuries to a child, Ernestine Richards, eight years of age, caused by her clothing catching fire from an open fireplace in a one-room schoolhouse located in Calhoun county.

The majority of the court favored an award and fixed the amount at $5,000.00. I dissented on the ground that, in my opinion, a county board of education was not a state agency as contemplated by the act creating the Court of Claims and that therefore we were without jurisdiction to hear and determine the merits of the claim. See dissenting opinion *in re Richards* v. *Board of Education*, 1 Ct. Claims (W Va.) 142, at page 151.

Subsequently, in the case or claim of *Mary Dillon, an infant,* v. *the Board of Education of Summers County*, involving injuries to the said infant while being transported in a school bus and allegedly caused by the careless and improper operation of the bus by the driver thereof, this court in a majority opinion written by Judge Bland, reversed its finding in Richards, *supra*, and held that a county board of education was not a state agency as contemplated by the act creating the Court of Claims and further specifically disapproved the majority opinion or finding in the *Richards* case. See *Dillon* v. *Board of Education*, 1 Ct. claims (W. Va.) 366. The foregoing decision also reversed the holding or finding in *Johnson* v. *Board of Education*, 1 Ct. claims (W. Va.) 158.

We are now asked to vacate the final order herefore entered in the matter of this claim, and to substitute therefor an order reestablishing the award of $5,000.00 and recommending it to the Legislature for payment accordingly. Counsel made an able argument, both before the court and in their brief in support of the motion, and by reason thereof, as well as the obvious importance of the claim and the deep sympathy we have for this unfortunate child, we have again read and reread our conclusions in this and other claims of similar nature heretofore determined; have again fully considered the important

questions involved and have again reached the conclusion that a county board of education is not a *state agency* as contemplated by the Court of Claims Act.

Since the entry of the orders in the foregoing claims denying jurisdiction, the Legislature at its last session (1945) passed an act specifically excluding from our jurisdiction any claim or claims that may grow out of any matter involving a county board of education, and, as well specifically excluding from the definition of "state agency" a county board of education. Chapter 39, Acts of the Legislature 1945.

It is therefore obvious that we have no jurisdiction to hear and determine any claim against a county board of education. We are bound by the provisions of the act in question. We are not empowered to determine the validity or legality of any act passed by the Legislature and must assume that the act in question fully governs us in our deliberations and the settlement of claims that are presented for our consideration. The application for the order to vacate the previous order refusing an award and to reinstate the award heretofore made is accordingly denied.

(No. 546—Claim denied)

S. E. LENT, Claimant,

V

STATE ROAD COMMISSION, Respondent.

Opinion filed November 8, 1946

When the basis of a claim prosecuted against a state agency is negligence and omission of duty, and it is clearly established by the evidence that it is not a claim which the state as a sovereign commonwealth should discharge and pay, an award will be denied.

Oliver D. Kessell, for claimant.

W. Bryan Spillers, Asistant Attorney General, for respondent.

ROBERT L. BLAND, JUDGE.

In this case, the claimant, S. E. Lent, of Leroy, Jackson county, West Virginia, maintains his right to have an award of $500.00 of public money, against the state road commission. He owns and resides upon a small farm of forty-one acres, situate on the waters of Fallen Timber, in Ravenswood district of said county. He affirms that he relies upon his said farm, and particularly his garden and truck patch, for food for his table. He prosecutes his said claim for damages alleged to have been caused by the negligence and omission of duty of the employees of the road commission. The state contests his claim. There is a well-recognized legal maxim, which reads: "The proof lies upon him who affirms, not upon him who denies."

The facts proved by the evidence introduced upon the investigation and trial of the claim may be summarized as follows:

Claimant's farm abuts upon the stream of water known as Fallen Timber, which is traversed by a state secondary road, and, at least at one point on the route, the stream bed and the roadbed are the same. Claimant had, planted and growing, a good garden about thirty feet from his residence, and not far distant from the road and stream. The principal portion of the farm was steep. Adjacent to and above claimant's land is a tract of land owned by one E. M. Knotts. Some years ago there was a heavy slip in the earth on the Knotts' land. On the night of Saturday, June 1, 1946, floodwaters ran down over the Lent land to the road. About six o'clock on the morning of Sunday, June 2, 1946, a slip occurred on the Knotts land, which was a continuation of the slip which had previously taken place thereon, and from that hour until about four o'clock in the afternoon rocks, trees, dirt, etc., ran from the Knotts land over claimant's land into the road. This mass of earth and other materials spread out on the road for a distance of approximately two hundred and fifty feet, and for a width of forty feet. It was about six feet in depth.

Claimant, apprehending that if a heavy rain should occur his garden would be completely destroyed, immediately communicated with Creed Carmichael, the road commission's county superintendent. On Monday morning following the heavy

slip of earth Mr. Carmichael and Mr. O. C. Hill went to the scene and viewed the condition of the road. The county superintendent agreed that something should be done to clear away the debris, in order to avoid damage in case of flood to claimant's garden. He sent five employees of the road commission to the Lent property on the following day. They chopped brush and did what they could to relieve the situation and let the water out of the road but, on account of the extraordinary mass of earth and other substances which had been deposited, it was impossible to clear the road. In order to remove the obstruction, it was apparent to the road officials that it would be necessary to bring in machinery. The work necessary to be done to remove the huge mass of earth from the road could not be done by pick and shovel. The water from Fallen Timber stream caused the earth deposited upon the highway to become "soupy," as described by the witnesses who testified. There was no machinery suitable for the removal of the obstruction immediately available. There were between five hundred and six hundred truckloads of dirt and logs in the highway, part thereof being already on claimant's garden or truck patch. The road commission's county superintendent concluded, after a personal inspection of the highway, that it would be necessary to have a shovel to remove the earth from the road. This was after he had sent a foreman and five crewmen to examine the highway and determine that only a shovel could remove the obstruction. There was no shovel that could be used in Jackson county. On Wednesday, the 5th of June, 1946, the district engineer for the road commission at Parkersburg, accompanied by the maintenance superintendent for three counties, including Jackson county, who was in charge of equipment, visited the highway on which the earth from the slip was deposited, and agreed that a shovel would be necessary for its removal. The nearest point from which a shovel could be obtained was in Wood county. The district engineer directed a shovel to be sent to Jackson county as soon as possible. The shovel intended to be used was at the time being used on the north fork of Lee Creek, in Wood county, about fifty miles from the slip in question. The shovel could not be immediately

removed to Jackson county, since it was being used on a road in Wood county, which had been closed and the work on which was necessary to be completed before the shovel could be sent to Jackson county. This shovel was, however, sent to Jackson county as quickly as it was possible for it to be released from the necessary work in Wood county. The only other shovel which would have been available for use in Jackson county was a truck shovel that could not be operated in the slip, on account of the condition of the material of the slip. As soon as the shovel could be removed, however, it was sent to Jackson county to remove the slip of earth from the highway. Before its arrival, however, and on the 13th of June, 1946, there was a heavy rain, and on the 19th of June there was a further, heavier rain. The water produced by these two rains backed up on claimant's garden and practically destroyed all of the growing products thereon, and permanently damaged the soil.

Claimant contends, therefore, that the failure of the road commission to remove the obstruction from the highway, caused by the slip from the Knotts land, before the two rains in question occurred, constituted negligence and omission of duty, entitling him to compensation for the losses which he has sustained.

Under the evidence, we cannot conclude that the state or the said state road commission was in any respect responsible for the slip on the Knotts land which deposited the earth on the highway, or that the road commission was in any way guilty of an omission of duty in removing the obstruction from the highway. It is clearly apparent that the road commission acted as promptly as it was possible for it to do in clearing the road. It could not reasonably be expected that it would leave the work in Wood county where a road was closed and remove the shovel to Jackson county earlier than it actually did so. It is unfortunate that claimant should have sustained the loss of his garden and truck patch, representing a season's work, but it does not follow that he has a right to compel the state to compensate him for such losses. There is no moral obligation upon the part of the state which can be enforced upon equitable prin-

ciples alone. 48 Am. Jur., States, Territories, and Dependencies, Section 73. The Legislature has unquestioned power under circumstances to make appropriations of the public moneys, but in the recent case of *State ex rel. Adkins* v. *Sims, Auditor,* 127 W. Va. 786; 34 S. E. 2d 585, the Supreme Court of Appeals of West Virginia has held:

> "In order to validate a legislative appropriation of public money for private use it must affirmatively appear that the Legislature in making the appropriation has found that it was necessary in order to discharge a moral obligation of the State."

We do not perceive that any such moral obligation exists in the instant case.

In the construction and maintenance of its highways the state exercises a governmental function. Under general law, as the writer of this statement understands, the state is not liable for the negligence of its officers, agents or employees, while engaged in the exercise of a governmental function, in the absence of a statute making it liable therefor. We have no such statute in West Virginia. It would seem that if the Legislature intended to create such liability it would enact a statute to that effect.

We are constrained under all the evidence in this case to absolve the road commission from negligence in removing the road obstruction from the highway under consideration, and to acquit it of any omission of duty in the premises.

An award is therefore denied and the claim dismissed.

(No. 541—Claim denied)

LEE ROY HENDRICKS, Claimant,

v

STATE ROAD COMMISSION, Respondent.

Opinion filed November 13, 1946

No duty, express or implied, rests upon the state road commission of West Virginia to maintain the highways under its jurisdiction in more than reasonably safe condition for use in the usual manner and by the ordinary methods of travel: and the state does not guarantee freedom from accident of persons traveling on such highways. *Earle Hutchison* v. *State Road Commission*, Case No. 525, *et als.*

Hendricks, Jones & Bouldin, for the claimant.

W. Bryan Spillers, Assistant Attorney General, for the state.

MERRIMAN S. SMITH, JUDGE.

Edward Hendricks, son of the claimant Lee Roy Hendricks, was driving his father's 1939 Pontiac automobile, and on the afternoon of April 27, 1946, upon returning from Charleston, West Virginia, on U. S. route 119, near Racine, Boone county, West Virginia, he wrecked the car, hence this claim to recover for the damages sustained.

On the morning of April 27, 1946, the employees of the state road commission were pulling the ditchline alongside this highway, which consisted of bringing out the dirt and other accumulation from the ditchline with a grader, depositing it upon the shoulder and filling in and levelling off the berm, and whatever dirt that was scraped on the pavement was swept off with two steel brooms by the employees. Between eleven and twelve o'clock it began to rain so the crew went in for the day. After a lapse of about three hours, between two and three o'clock that afternoon, Edward, with his companion and his sister, in driving south from Charleston ran off the concrete

pavement onto the berm of the road, whereupon he lost control of the car and swerved across the highway into the ditch on the opposite side of the road. From the evidence there was no car approaching, nor was he passing a car, and this was an eighteen-foot concrete pavement and practically straight for about a mile ahead, and judging from the physical circumstances young Hendricks was guilty of negligence, and must have been driving at an excessive rate of speed when he carelessly ran off the pavement onto the berm, and because of such speed lost control of his machine and swerved across the pavement to the east side and into the ditch.

This court has repeatedly held that "No duty, express or implied, rests upon the state road commission of West Virginia to maintain the highways under its jurisdiction in more than reasonably safe condtion for use in the usual manner and by the ordinary methods of travel; and the state does not guarantee freedom from accident of persons traveling on such highways."

In the instant claim the facts clearly show that the highway was in a reasonably safe condition, and the state had taken the proper precaution for the safety of the travelling public. Therefore, it is the opinion of this court that an award for damages in this claim should be, and is, hereby denied.

(No. 521—Claimant awarded $2,000.00 upon rehearing)

HAROLD H. CASHMAN, M. D., Claimant,

v

STATE BOARD OF CONTROL, Respondent.

Opinion filed April 19, 1946

Opinion on rehearing filed November 14, 1946

The State is under no moral obligation to compensate a physician on the medical staff of a state tubercular sanitarium who, by reason of his contact with the patients confined in said sanitarium or hospital, contracts

tuberculosis, unless it is shown that in some manner the state or the department involved was guilty of negligence that contributed to the said physician's contracting the disease in question.

Claimant, in his own behalf.

W. Bryan Spillers, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

In January, 1944, claimant joined the medical staff at the Hopemont sanitarium, a state institution located near Terra Alta in Preston county, West Virginia, and devoted to the treatment of tuberculous patients. He continued in this capacity on the said staff until October, 1944, at which time he, himself, became afflicted with pulmonary tuberculosis, contracted, he maintains, by reason of his close physical contacts with patients in the said sanitarium suffering from active pulmonary tuberculosis. Having had, prior to his illness, regular x-ray examinations made of his chest which proved negative, he now insists and concludes, as heretofore stated, that the nature of his services as such staff physician brought about his own illness and affliction.

In July, 1945, he applied for compensation to the state compensation commission, but was refused compensation on the ground "that the disability complained of was not due to an 'injury' in the course of and resulting from claimant's employment." An appeal to the workmen's compensation appeal board also resulted in a refusal to make an award and he now applies to this court for relief accordingly.

Is the state morally bound to compensate claimant under these conditions and in the light of the foregoing facts? It must be assumed, of course, that claimant was fully acquainted with the risk and hazard incident to his services as a physician in the said sanitarium; that he knew the danger incident to contacts with patients suffering from tuberculosis that he would be obliged to make; that he was aware of the danger of becoming afflicted himself by such contacts, and that such risk and danger connected with his services was voluntarily assumed

by him. No negligence of any kind is alleged or shown against the state or the department involved in carrying on the purposes or work of the sanitarium. In view of these circumstances does the claimant stand in any different position than the physician who is called upon to treat a highly dangerous and communicable disease found in a private home, and could such physician having contracted the disease have either a moral or legal claim for damages by reason of the contact so made? We do not think so.

A physician necessarily assumes the ordinary risks incident to the practice of his profession, and if, in such practice, he, himself, unfortunately contracts disease from contact with his patients, he becomes in the very nature of things a martyr to the vicissitudes of his profession and makes a sacrifice for which there is seemingly no compensation.

Considering all the facts and circumstances presented for our consideration an award is refused and the claim dismissed.

Upon petition for rehearing.

The state is morally bound to provide a safe, sanitary and hygienic place of employment for a physician employed as such in one of its tubercular sanitoria, and failure to do so thereby causing the physician to become afflicted, entitles the physician to an award.

Appearances:

Ralph L. Miller, for claimant;

Eston B. Stephenson, Assistant Attorney General, for the state.

CHARLES J. SCHUCK, JUDGE.

At the April term, 1946, this court denied the claimant's right to any award on the theory that as a physician at the tubercular Hopemont sanitarium he could not recover compensation from the state, in consequence of his having contracted tuberculosis, unless it was shown that the department involved

was guilty of negligence of such nature as would contribute to his contracting the disease in question. Subsequently a motion for a rehearing was granted and we now have before us testimony which presents a full and complete picture of the situation that prevailed at Hopemont at the time claimant contraced the disease and the conditions prevailing under which he was obliged to render his services as such physician. We learn from the testimony that he was obliged to give his services as such physician for a minimum of a year from the date of his entering the institution (record p. 4) and that if he concluded to quit or sever his connection with the sanitarium before the end of that period he would be virtually barred from offering his professional services to any other similar institution by reason of an unwritten rule of law of the American Medical Association to that effect (record p. 5). The purpose of this law is obvious and without it endless confusion and embarrassment would result; and a sanitarium such as Hopemont might experience serious difficulty in maintaining its staff if this ethical rule were not invoked. This uncontradicted testimony was not before us at the previous hearing and in our opinion now gives a reasonable and potent answer to the proposition that claimant could have severed his connection with the institution if he was dissatisfied with prevailing conditions while engaged as a physician there. He began his work at Hopemont in January 1944 and was stricken with the disease in October 1944, so that he had not yet served a year of his contract at the time he became afflicted with tuberculosis. He has been bedfast at the institution since that time. A thorough physical examination of claimant at the beginning of his employment revealed that he was in good health and free from any signs or indications of tuberculosis.

The testimony further shows that claimant was called upon to attend eighty patients (record p. 11) and that he was assisted in his work by not over three nurses; that considering existing conditions, the dangerous nature of the disease and the ever-present possibility of communication of the disease to doctors, nurses, and those in attendance, not less than thirty-two nurses ought to have been employed to care for these eighty patients

and a larger staff of doctors maintained to properly supervise the treatment of such a large number; these standards being fixed by the recognized medical authorities of our country on the treatment of tuberculosis, as shown by the American Review of Tuberculosis of May 1945, filed as part of the record with us. We are further advised in this matter that the condition of sanitation and hygiene existing in a tubercular sanitarium, tending to arrest the disease and to prevent its communication to others, necessarily depends on the number and efficiency of the nurses employed. It may well be said, of course, that the state could not, from a financial standpoint, be called upon perhaps to have a full quota of doctors and nurses as required by the standards heretofore referred to, but in view of the marked difference between the number actually employed at Hopemont at the time and the number fixed by the American Review of Tuberculosis, conditions there were such, in our opinion, as to present extraordinary risks to those employed as doctors, nurses or attendants.

From the testimony we learn further that tuberculosis is an air-borne disease and that the tubercle bacillus can be transferred from an infected patient to others through the air. All of which means that a sufficient staff of nurses must be maintained at a tubercular sanitarium to properly and adequately instruct and watch over afflicted patients to prevent communication of the disease and to maintain the necessary and required sanitary and hygienic standards for arresting the disease and preventing its communication to others. In this connection we are of the opinion that the staffs of both doctors and nurses were inadequate at Hopemont, at the time claimant became afflicted, to meet the demands of the institution, and to properly take care of the large number of patients then confined there. The testimony also reveals that additional nurses could have been obtained but that the salaries paid were below those fixed in other states for the same kind and standard of services, and consequently brought about a refusal to serve on the part of prospective nurses. All of these facts added together show obviously that claimant was not afforded a reasonably safe place in which to render his services and thus fulfill his contract

of employment to the state. The duty to properly protect claimant in his work as such physician was breached, and in equity and good conscience the state was morally bound to provide a reasonably safe, sanitary and hygienic institution for those employed to discharge their respective duties there and to maintain the standards of efficiency that the very nature of the sanitarium required.

A survey by efficient experts was made of the Hopemont sanitarium, at the request of our Governor about ten or twelve months ago. They found that the absolute minimum of salaries to properly take care of the sanitarium was $270,000.00. The present working cost is, and for several years past has been, $192,000.00. The testimony shows (record p. 24) that the inability to get nurses is attributed to lack of funds with which to pay the prevailing salary range. Another survey of Hopemont was also made by one Esta McNebb, at the time supervisor of Lowman Pavilion, the tuberculosis division of the City Hospital at Cleveland. Miss McNebb is at the present time the tuberculosis consulting nurse of the Veterans' Administration. While her report goes into all the details concerning the conditions existing at Hopemont, her conclusion is perhaps sufficient for the purpose of this opinion. She concludes as follows: "The medical care of the patients at Hopemont is excellent, the clinical material is abundant; the physical plant is adequate and capable of adaptation; the nursing department has excellent leadership, but is *too limited* to meet the needs of so many patients." (Record pp. 44-45).

In view, therefore, of all the testimony now submitted and the facts now before us, most of which were unknown to us at the first hearing, we are constrained to reverse our previous finding and order, and to hold that the state, having failed in its duty to claimant to provide a safe, sanitary and hygienic place of employment, is morally bound to compensate him for his loss of services and the suffering incident to the disease contracted by him.

The matter of just and proper compensation now concerns us in fixing the amount of an award to claimant. He was receiv-

ing a salary of $2000.00 per annum at the time he was stricken in October, 1944. He has been bedfast since that time and the testimony of Doctor Salkin, the superintendent of the institution (record p. 17) is to the effect that claimant will not be able to assume his duties for another year. Considering the claim from the viewpoint of our law applicable to claims before the workmen's compensation commission or department, claimant, if he had been injured in the course of his employment as the term "injury" is defined, would have been entitled to a maximum award of $18.00 per week for a maximum period of 156 weeks, assuming that the injury would be of a non-permanent nature, ch. 131, art. 4, sec. 6, Acts 1945 Legislature, code chapter 23, art. 4, sec. 6, and would therefore be entitled to the full sum of approximately $2800.00. However, in view of the fact that claimant's length of disability is somewhat problematical and that he may be able to return to his duties in another year, or approximately two or two and one-half years from the date he was first stricken, we feel that an award of two thousand dollars ($2000.00) would be proper and we so find accordingly.

MERRIMAN S. SMITH, JUDGE, dissenting.

The West Virginia workmen's compensation law does not classify tuberculosis as an injury. This is primarily the duty of the Legislature and is not a matter for court action. The orderly way to receive compensation for an injury is through the Legislature within the workmen's compensation law and not by court action.

Responsible democratic government should be achieved through the legislative branch of the government and not through the judiciary.

Dr. Cashman assumed the risk of his employment and should have acquainted himself with the conditions at Hopemont before accepting employment. He was undoubtedly familiar with the standards as prescribed by the American Medical Association.

I have the greatest sympathy and fully appreciate the plight our tubercular sanitoria are confronted with in securing physicians, surgeons, and nurses, and some legislative provision should be made for such employees when stricken with such dread disease while engaged in such a humanitarian work. Until such time as the Legislature sees fit to incorporate tuberculosis as an injury within the West Virginia workmen's compensation law, the physicians, surgeons and nurses assume the risk of their employment.

The medical profession considers tuberculosis as an "accidental injury" and it should be so considered by the members of the Legislature.

The majority opinion presents a strong plea on behalf of an award for the claimant and it is with reluctance that I do *not* favor an award in this case.

(No. 556—Claim denied)

MAE MORGAN, Claimant,

v

STATE CONSERVATION COMMISSION, Respondent.

Opinion filed November 18, 1946

The state has a general right to protect wild animals in the interest of the public, and complaint may not be made of incidental injuries that may result from such protection.

Roland A. Clapperton, for the claimant;

W. Bryan Spillers, Assistant Attorney General, for the state.

ROBERT L. BLAND, JUDGE.

On the 15th day of October, 1946, claimant Mae Morgan, a widow fifty-five years of age, residing on a farm owned by her in Nicholas county, West Virginia, left her home for the

purpose of calling upon a neighbor. She walked along a path on her own premises, about seventy-five feet from a state-controlled secondary highway. After proceeding a short distance she left the path and walked to a point where core drilling for coal had been conducted on her land. As she was looking at the rock which had been removed from the test hole and reflecting upon the depth of the hole she observed a buck deer coming in her direction. Her first thought was that the deer would run away when he saw her. It did not do so, however, but on the contrary viciously attacked her, knocking her down and goring her. She was alone, there being no one around to render assistance. As a result of the combat she sustained serious personal injuries. Eventually assistance came to her, and she was removed to the Sacred Heart Hospital at Richwood where she received hospitalization. She claims to have incurred liability to the extent of $825.00, for which amount she now seeks an award, and further, for a sufficient sum of money to compensate her for the permanent injuries she sustained. The conservation commission challenges the right of the claimant to an award in the premises. Claimant concedes that the question presented by her claim is one of first impression in West Virginia.

It will be borne in mind that the protection and conservation of wild animals is provided for by statute in West Virginia. Chapter 20, code. This protection is especially applied to deer. The general right and ownership of wild game is in the people of the state. In *State* v. *Southern Coal & Transportation Company*, 71 W. Va. 470, the case dealt with fish. The Court held as follows:

> "The State is owner of the fish in its streams, and as such, under its police power, may enact legislation to protect the propagation of fish from injury from placing in, or allowing the entrance into, streams of any matter of any kind deleterious to the propagation of fish."
>
> "The State is not liable for injury to private property by beavers which it imports and attempts to protect by statute, whether the statute is constitutional

or not." *Barrett* v. *State*, 220 N. Y. 423; point 3 syllabus L. R. A. 1918C, 400.

In the opinion in that case it is said:

> "As to the first, the general right of the government to protect wild animals is too well established to be now called in question. Their ownership is in the State in its sovereign capacity, for the benefit of all the people. Their preservation is a matter of public interest. They are a species of natural wealth which without special protection would be destroyed. Everywhere and at all times governments have assumed the right to prescribe how and when they may be taken or killed. As early as 1705 New York passed such an act as to deer. (Colonial Laws, vol. 1, p. 585.) A series of statutes has followed protecting more or less completely game, birds, and fish.
>
> " 'The protection and preservation of game has been secured by law in all civilized countries, and may be justified on many grounds. * * * The measures best adapted to this end are for the legislature to determine, and courts cannot review its discretion. If the regulations operate, in any respect, unjustly or oppressively, the proper remedy must be applied by that body.' (*Phelps* v. *Racey*, 60 N. Y. 10, 14.) [19 Am. Rep. 140.]
>
> "Wherever protection is accorded, harm may be done to the individual. Deer or moose may browse on his crops; mink or skunks kill his chickens; robins eat his cherries. In certain cases the legislature may be mistaken in its belief that more good than harm is occasioned. But this is clearly a matter which is confided to its discretion. It exercises a governmental function for the benefit of the public at large, and no one can complain of the incidental injuries that may result."

In the case of *Mann* v. *State*, Court of Claims of N. Y. (1944) 47 N. Y. Supp. 2d 553, the *syllabus* is as follows:

> "Where deer suddenly darted out and collided with automobile while claimant was driving on State Park Commission highway, state was not liable, notwith-

> standing alleged failure to provide suitable guards, railings or fences, since state was acting as trustee for people and exercising a governmental function for benefit of public at large."

And from the opinion:

> "Further, had the State undertaken to erect such fences for confining of wild deer, it would have been confronted with an intricate problem in view of the deer's well-known agility in scaling considerable heights."

We are disposed in making a determination of the instant claim to adopt the holding in point 1 of the *syllabus* of the New York Court of Claims in the case of *Corron* v. *State*, Court of Claims of N. Y. (1939) 10 N. Y. Supp. 2d 960, which reads as follows:

> "The state has a general right to protect wild animals in the interest of the public, and complaint may not be made of incidental injuries that may result from such protection."

In our judgment that is a well-reasoned opinion.

We are unable to see any moral obligation on the part of the state to compensate claimant for her unfortunate accident.

An award is, therefore, denied and the claim dismissed.

REFERENCES

AGENCY—Scope of Employment

Where an employee of the state, having established headquarters for seven days in the week, after work hours on Saturday evening while enroute to his home to spend the week end with his family, is not in the furtherance of his employer's business, nor does he in any way directly or indirectly promote the welfare of his employer's business; under the evidence in these cases awards will be denied. *Darlington* v. *State Road* 205

ANIMALS

The state has a general right to protect wild animals in the interest of the public, and complaint may not be made of incidental injuries that may result from such protection. *Morgan* v. *State Conservation* 266

See also

Kattong v. *State Road* 121

Bond v. *State Road* 242

AUTOMOBILES—See Collisions with State Vehicles

BLASTING OPERATIONS—See

Bennett v. *State Road* 5

Bond v. *State Road* 242

McKinney v. *State Road* 41

Stukey v. *State Road* 240

Valvoline Pipe Lines v. *State Road* 222

BRIDGES and CULVERTS

A case in which, upon the facts proved, an award is made in favor of an infant male child who suffered a broken arm while crossing over a defective bridge on a state-controlled highway. *Marks* v. *State Road* 250

Failure of the state road commission to provide and install necessary warning signs of danger at a point where a bridge on the state highway had been washed out by a flood may, in circumstances, warrant an award in favor of the claimant by reason of such condition of affairs. *Randolph* v. *State Road* 164

When the state road commission, in the exercise and discharge of a governmental function, finds it necessary to repair a bridge spanning a stream of water on a state highway, removes the floor from such bridge in the performance of such repair work, and in order to warn persons traveling upon and using said highway of existing danger at the point where the bridge is located, erects a barricade, installs lights on either side of the bridge and provides a well defined detour sign with reflector lights therein, an award will not be made to claimants who attempted to drive an automobile in the night time over the said bridge from which such floor had been removed and thereby suffered personal injuries and sustained property loss. *Jordan* v. *State Road* 224

See also

Bowman v. *State Road* . . 11
Crihfield v. *State Road* . . 44
Dempsey v. *State Road* 38
Gantzer v. *State Road* 221
Holbert v. *State Road* . 13
Lemasters v. *State Road* 243

COLLISIONS WITH STATE VEHICLES

CONTRIBUTORY NEGLIGENCE. In a claim for property damage wherein there is a collision on the highway and both parties to the accident fail to use ordinary care this court does not recognize comparative negligence and each party thereto is responsible for the damage to his automobile or truck. *Peters* v. *State Road* 183

The Court of Claims will recommend to the Legislature appropriations for the payment of damages for property loss and personal injuries suffered when it is disclosed by the record of claims asserted against the state that there is a moral obligation on the part of the state to make such payments and in equity and good conscience it should do so. *Utterback* v. *State Road* 96

See also

Anderson v. *State Conservation* 131
Haller v. *State Road* 10
Hamrick v. *State Road* 129
Hranka v. *State Road* 37
Neff v. *State Road* 12
Ohio Valley Bus Company v. *State Road* 60
Peters v. *State Road* 149, 183
Queen v. *State Road* 143
Ragase v. *State Road* 64
Robertson v. *State Road* 16
Utterback v. *State Road* 96

CONTRACTS

Claimant not having been on the preferred eligible list at the time of her dismissal by the Cabell county unit is not entitled to a salary during the period of dismissal, even though the reasons for said dismissal are not sustained and claimant was fully exonerated. The preferred eligible list and ratings must control and govern in a period during which an emergency arises caused by the curtailment of the appropriation for the department and when it is found necessary to lessen the number of employees or "visitors." *Garda* v. *Dept. Public Assistance* 35

Syllabus in re the claim of *Shepherd* v. *Department of Public Assistance* reaffirmed and adopted. *Wilson* v. *Public Assistance* 34

An employee of the department of public assistance engaged in the work of investigating applications for relief and commonly termed a "visitor" and whose position and salary are based upon seniority and service ratings and who is one upon the preferred eligible list when appropriations for the said department are curtailed or decreased, cannot be dismissed without just cause and if so dismissed without such just cause is entitled to her salary during the period of such dismissal. *Shepherd* v. *Public Assistance* 30

There is no provision in the budget act for the payment of overtime to employees working on a monthly wage scale as set up by the budget director; no provision is made for a contract of employment to such employees either express or implied, covering payment for overtime. *Grogan* v. *Board Control* 169

As a general rule when the head of a state agency incurs an obligation on behalf of his department in performance of an administrative act, such indebtedness should be paid out of funds available for the purpose, in order that the state's credit be held inviolate. *Charleston Mail* v. *Health Department* 174

Compensation for duties performed and services rendered by a deputy commissioner of forfeited and delinquent lands is payable out of the operating fund for the land department in the auditor's office; and the Court of Claims will not recommend to the Legislature an appropriation for such compensation when a claimant fails to allege and prove that compensation for such services claimed by him and to which he might show himself to be justly entitled is not available in the said fund for the satisfaction of his claim. *Thrift* v. *Auditor* 18

When a publishing company publishes legal notices contracted for by constitutional authority, as prescribed by statute, it becomes a just obligation and an award should be made. *Berkeley Printing* v. *Auditor* 231

Pursuant to the purpose and spirit of the Act of the Legislature creating the State Court of Claims, an award may be made for the payment of a claim against the state when the peculiar facts supporting such claim show it to be just and meritorious and for which the state has received distinct value and benefit. *Roberts* v. *Board of Control* 235

See also
Preiser Co. v. *Board Control* 9

CONTRIBUTORY NEGLIGENCE

When the state road commission, in the exercise and discharge of a governmental function, finds it necessary to repair a bridge spanning a stream of water on a state highway, removes the floor from such bridge in the performance of such repair work, and in order to warn persons traveling upon and using said highway of existing danger at the point where the bridge is located, erects a barricade, installs lights on either side of the bridge and provides a well defined detour sign with reflector lights therein, an award will not be made to claimants who attempted to drive an automobile in the night time over the said bridge from which such floor had been removed and thereby suffered personal injuries and sustained property loss. *Jordan* v. *State Road* .. 224

An award will be refused a claimant to whom two courses of conduct are open in the operation of a vehicle on a public road and who did not exercise ordinary care in choosing the course to pursue and thereby sustained property loss. *Athey-Brooks* v. *State Road* .. 79

An award will be refused, where reasonable care has not been exercised by a claimant in driving an automobile over an uneven rock stratum in the road, causing an accident, in which claimant is injured and for which an award is asked against respondent. *Yoak* v. *State Road* .. 17

CONTRIBUTORY NEGLIGENCE. In a claim for property damage wherein there is a collision on the highway and both parties to the accident fail to use ordinary care this court does not recognize comparative negligence and each party thereto is responsible for the damage to his automobile or truck. *Peters* v. *State Road* .. 183

DAMAGES

Where the testimony shows that a farm or land was benefited by a road construction and improvement rather than damaged, an award, of course, will be denied. *Quick* v. *State Road* .. 203

ESCAPEES

Under the act creating the Court of Claims negligence on the part of the state agency involved must be fully shown before an award will be made. *Robison* v. *Board of Control* .. 66

Where escaped convicts steal and take away an automobile and after using the car, abandon it, having caused damages thereto, the state agency involved will not be held liable for the damages, unless negligence on the part of said agency is fully shown and that such negligence contributed to and made possible the escape. *Ruth Miller* v. *Board of Control*, 1 Ct. Claims (W. Va.) 97, affirmed. *Arrick* v. *Board of Control* .. 141

An award will not be made in favor of a claimant whose automobile was stolen and damaged by escapees of the West Virginia industrial school for boys at Pruntytown, unless culp-

INSURANCE PREMIUMS ON STATE VEHICLES—See

JURISDICTION

LATERAL SUPPORT

LIMITATION OF ACTIONS—See Statute of Limitations

MONEY PAID UNDER MISTAKE—See

MORAL OBLIGATION

As a sovereign commonwealth, the state of West Virginia should, in equity and good conscience, discharge and pay an obligation for which it is both morally and legally liable. *Baltimore and Ohio* v. *State Road* 176

The Court of Claims will recommend to the Legislature appropriations for the payment of damages for property loss and personal injuries suffered when it is disclosed by the record of claims asserted against the state that there is a moral obligation on the part of the state to make such payments and in equity and good conscience it should do so. *Utterback* v. *State Road* 96

See also

(As to duty of Legislature to find, see Note 2, page XXXVI).

NEGLIGENCE

The fact that a stone or rock falls from the hillside adjacent to a public road or highway, striking and wrecking a passing truck, does not of itself constitute negligence on the part of the state road commission. See *syllabus Clark* v. *Road Commission*, 1 Ct. Claims (W. Va.) 230. *Hutchinson* v. *State Road* . 172

Under the act creating the Court of Claims negligence on the part of the state agency involved must be fully shown before an award will be made. *Robison* v. *Board of Control* 66

Where an employee of the state, having established headquarters for seven days in the week, after work hours on Saturday evening while enroute to his home to spend the week end with his family, is not in furtherance of his employer's business, nor does he in any way directly or indirectly promote the welfare of his employer's business; under the evidence in these cases awards will be denied. *Darlington* v. *State Road* 205

No duty, express or implied, rests upon the state road commission of West Virginia to maintain the highways under its jurisdiction in more than reasonably safe condition for use in the usual manner and by the ordinary methods of travel; and the state does not guarantee freedom from accident of persons traveling on such highways. *Hutchison* v. *State Road* 217

The Court of Claims will recommend to the Legislature appropriations for the payment of damages for property loss and personal injuries suffered when it is disclosed by the record

of claims asserted against the state that there is a moral obligation on the part of the state to make such payments and in equity and good conscience it should do so. *Utterback, et al* v. *State Road* 96

When a student attending a state college and living in a dormitory maintained in connection therewith voluntarily uses a fire escape for purposes of ingress and agress rather than the main entrances to such building provided for such purposes and in consequence of such use of such fire escape sustains personal injuries for which the college authorities are in no way responsible a claim for damages suffered will be denied. *Thompson* v. *Board Control* 111

No duty, express or implied, rests upon the state road commission of West Virginia to maintain the highways under its jurisdiction in more than reasonably safe condition for use in the usual manner and by the ordinary methods of travel; and the state does not guarantee freedom from accident of persons traveling on such highways. *Charlton* v. *State Road* 132

Where escaped convicts steal and take away an automobile and after using the car, abandon it, having caused damages thereto, the state agency involved will not be held liable for the damages, unless negligence on the part of the said agency is fully shown and that such negligence contributed to and made possible the escape. *Ruth Miller* v. *Board of Control,* 1 Ct. Claims (W. Va.) 97, affirmed. *Arrick* v. *Board Control* 141

An award will not be made in favor of a claimant whose automobile was stolen and damaged by escapees of the West Virginia industrial school for boys at Pruntytown, unless culpability on the part of the state agency involved, its officers, agents or servants is fully shown and that such culpability contributed to and made possible the escape of such inmates. *Parsons* v. *Board Control* 147

When the basis of a claim prosecuted against a state agency is negligence and omission of duty, and it is clearly established by the evidence that it is not a claim which the state as a sovereign commonwealth should discharge and pay, an award will be denied. *Lent* v. *State Road* 253

Failure of the state road commission to provide and install necessary warning signs of danger at a point where a bridge on the state highway had been washed out by a flood may, in circumstances, warrant an award in favor of the claimant by reason of such condition of affairs. *Randolph* v. *State Road* 164

The state does not guarantee freedom from accident or safety of pedestrians on its public highways, and the duty of the state or highway commission is a qualified one. *Harmon* v. *Road Commission,* 2 Ct. Claims (W. Va.) 329; *Woofter* v. *Road Commission,* 2 Ct. Claims (W. Va.) 393. *Brady* v. *State Road* 167

An award will be refused, where reasonable care has not been exercised by a claimant in driving an automobile over an uneven rock stratum in the road, causing an accident, in which claimant is injured and for which an award is asked against respondent. *Yoak* v. *State Road* 17

The state does not guarantee the freedom from accident of persons travelling on its highways. *Brann* v. *State Road* ... 118

Inexcusable laxity in the handling and guarding of prisoners committed to the state penitentiary, under circumstances as presented in the prosecution of this claim, constitutes negligence on the part of the prison officials, and if such negligence is the cause of a crime committed by a prisoner against a citizen, whereby such citizen, or his estate, suffers damage, an award will be made. *Davis Trust, adm.* v. *Board Control* . 188

LATERAL SUPPORT. In a cause of action for damages caused by removal of lateral support, an award will be denied where the physical conditions show that the state excavated entirely within its right of way and that the slipping and cracking of dirt on adjacent property was caused by filled-in dirt and the virgin soil was not molested by any excavation on the state's property *Sechini* v. *State Road* 200

CONTRIBUTORY NEGLIGENCE. In a claim for property damage wherein there is a collision on the highway and both parties to the accident fail to use ordinary care this court does not recognize comparative negligence and each party thereto is responsible for the damage to his automobile or truck *Peters v. State Road* . . 183

In claims arising out of automobile accidents, this court will give utmost consideration to the physical facts surrounding the circumstances, especially where the testimony of the witnesses is conflicting, weak and indefinite. *Ellison* v. *State Road* 157

An award will not be made in favor of a claimant whose automobile was stolen and damaged by escapees of the West Virginia industrial school for boys at Pruntytown, unless culpability on the part of the state agency involved, its officers, agents or servants is fully shown and that such culpability contributed to and made possible the escape of such inmates. *Parsons* v. *Board Control* 147

No duty, express or implied, rests upon the state road commission of West Virginia to maintain the highways under its jurisdiction in more than reasonably safe condition for use in the usual manner and by the ordinary methods of travel; and the state does not guarantee freedom from accident of persons traveling on such highways. *Earle Hutchison* v. *State Road Commission*, Case No. 525, *et als. Hendricks* v. *State Road* 258

The State is under no moral obligation to compensate a physician on the medical staff of a state tubercular sanitarium who, by reason of his contact with the patients confined in said sanitarium or hospital, contracts tuberculosis, unless it is shown that in some manner the state or the department involved was guilty of negligence that contributed to the said physician's contracting the disease in question. *Cashman* v *Board Control* 259

To release a prisoner from the penitentiary upon parole without having a bond executed as required by chap 62, art. 12, sec. 17, of the code of West Virginia, is improper and in viola-

PAROLEES

PENAL INSTITUTIONS

PROOF OF CLAIMS

RAILROADS

As a sovereign commonwealth, the state of West Virginia should, in equity and good conscience, discharge and pay an obligation for which it is both morally and legally liable. *Baltimore & Ohio* v. *State Road* . 176

RIGHT OF WAYS and ROADS

An award will be refused a claimant to whom two courses of conduct are open in the operation of a vehicle on a public road and who did not exercise ordinary care in choosing the course to pursue and thereby sustained property loss. *Athey-Brooks* v. *State Road* . 79

Where an employee of the state, having established headquarters for seven days in the week, after work hours on Saturday evening while enroute to his home to spend the week end with his family, is not in the furtherance of his employer's business, nor does he in any way directly or indirectly promote the welfare of his employer's business; under the evidence in these cases awards will be denied. *Darlington, et al. v State Road* . 205

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Failure of the state road commission to provide and install necessary warning signs of danger at a point where a bridge on the state highway had been washed out by a flood may, in circumstances, warrant an award in favor of the claimant by reason of such condition of affairs. *Randolph* v. *State Road* 164

ROCK SLIDES

SCHOOLS—BOARDS OF EDUCATION—See State Agencies

STATE AGENCIES

The Court of Claims is without jurisdiction to hear and determine or to make an award in any matter or claim involving a county board of education. Reaffirming *Dillon* v. *Board of Education,* 1 Ct. Claims (W. Va.) 366. *Richards* v. *Board Education* 251

STATE EMPLOYEES

A claim in which the facts adduced justify an addition payment to claimant for injuries received while employed as a laborer or janitor at Marshall College. *Reynolds* v. *Board* Control 185

Where the petition filed and the testimony adduced clearly show that the claimant has the right to have his claim heard and determined in a state court, this court is without jurisdiction, and a motion to dismiss for want of jurisdiction will be sustained. *McVey* v. *State Mines* 233

Claimant not having been on the preferred eligible list at the time of her dismissal by the Cabell county unit is not entitled to a salary during the period of dismissal, even though the reasons for said dismissal are not sustained and claimant was fully exonerated. The preferred eligible list and ratings must control and govern in a period during which an emergency arises caused by the curtailment of the appropriation for the department and when it is found necessary to lessen the number of employees or "visitors." *Gurda* v. *Public Assistance* 35

Syllabus in re the claim of *Shepherd* v. *Department of Public Assistance* reaffirmed and adopted. *Wilson* v. *Department Public Assistance* 34

An employee of the department of public assistance engaged in the work of investigating applications for relief and commonly termed a "visitor" and whose position and salary are based upon seniority and service ratings and who is one upon the preferred eligible list when appropriations for the said department are curtailed or decreased, cannot be dismissed without just cause and if so dismissed without such just cause is entitled to her salary during the period of such dismissal. *Shepherd* v. *Public Assistance* 30

The state is morally bound to provide a safe, sanitary and hygienic place of employment for a physician employed as such in one of its tubercular sanitoria, and failure to do so thereby causing the physician to become afflicted, entitles the physician to an award. *Cashman* v. *Board Control* 259

There is no provision in the budget act for the payment of overtime to employees working on a monthly wage scale as set up by the budget director: no provision is made for a contract of employment to such employees either express or implied, covering payment for overtime. *Grogan* v. *Board Control* 169

Compensation for duties performed and services rendered by a deputy commissioner of forfeited and delinquent lands is payable out of the operating fund for the land department in the auditor's office; and the Court of Claims will not recommend to the Legislature an oppropriation for such compensation when a claimant fails to allege and prove that compensation for such services claimed by him and to which he might show himself to be justly entitled is not available in the said fund for the satisfaction of his claim. *Thrift* v. *Auditor* 18

The State is under no moral obligation to compensate a physician on the medical staff of a state tubercular sanitarium who, by reason of his contact with the patients confined in said sanitarium or hospital contracts tuberculosis, unless it is shown that in some manner the state or the department involved was guilty of negligence that contributed to the said physician's contracting the disease in question. *Cashman* v. *Board Control* 259

When an employee of the state contracts lobar pneumonia and dies therefrom and the testimony fails to connect the incipiency of the disease directly with any act of his employment there will be a denial of an award. *Logan* v. *State Road* .. 238

See also
Bennett v. *State Road* 5
McVey v. *Mines Dept.* 139
McGhee v. *Board Control* 154

STATUTES OF LIMITATIONS

An award will not be made to a person failing to file application for refund of taxes paid on gasoline within sixty days after date of purchase or delivery of gasoline, as provided by general law, when it appears from the general law that it is the policy of the Legislature to deny payment of such refunds unless such application is filed as prescribed by the statute permitting refunds on gasoline used for certain specific purposes. *Snee* v. *State Tax* 94

An award will not be made to a person failing to file application for refund of taxes paid on gasoline within sixty days after date of purchase or delivery of gasoline as provided by general law, when it appears from the general law that it is the policy of the Legislature to deny payment of such refunds unless such application is filed as prescribed by the statute permitting refunds on gasoline used for certain specific purposes. *State Construction* v. *State Tax* 85

The Court of Claims is without jurisdiction to extend the time fixed by statute to make application for refund of excess income tax paid. Such income taxpayer is obliged to avail himself of the remedy provided by law for relief. *Long* v. *State Tax* 25

SUBROGATION

Where the facts supporting a claim against the state warrant it an award will be made under the doctrine of subrogation. *Aetna Casualty* v. *State Road* 158

TAXES

WILD ANIMALS—See Animals

WORKMEN'S COMPENSATION